

PROBATE ADMINISTRATION

[2010]



**ADMINISTRATIVE OFFICE
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This benchguide discusses the probate administration of estates from the petition to the final distribution. It covers bond, independent administration of estates, inventory and account, management of the estate, distribution, and the appointment of an executor. It also includes relevant Procedural Checklists,

II. PROCEDURAL CHECKLISTS

A. [§302.2] Hearing Preparation

(1) *Determine whether the hearing was properly scheduled 15 to 45 days after the petition was filed.* Prob C §8003(a); see §§302.10–302.11.

(2) *Determine whether proper notice of the hearing was given to the required persons at least 15 days before the hearing date.* Prob C §§8003(b), 8110; see Judicial Council Form DE-120, DE-121; see §302.11. *Notice must have been given to the persons listed in Item 9 of the Petition for Probate, Judicial Council Form DE-111.*

(3) *Determine whether notice was properly published.* Prob C §8120. *An affidavit of publication from the publisher must be filed.* See §302.13.

(4) *Determine whether jurisdiction and venue are correct.* Prob C §§7050–7052. Prob C §7051; See Petition for Probate, Judicial Council Form DE-111, 4(a); see §302.8.

(5) *Determine status of petitioner and what type of personal representation is sought.* Prob C §§8420, 8440, 8460; Petition for Probate, Judicial Council Form DE-111, 2(b), 4(g); §§302.19–302.24.

(6) *Determine whether objection to will has been filed.* See §302.37. *If objection filed, schedule trial of will contest.*

B. [§302.3] Hearing

(1) *Commissioners or attorneys serving as temporary judges should obtain a stipulation from the parties.* Cal Rules of Ct 2.831(a).

(2) *Determine whether an objection has been filed or made, and if it is made orally at the hearing, determine whether to continue the hearing to allow a written objection to be filed.* See §302.37.

(3) *Determine when and where decedent died.* Petition for Probate, Judicial Council Form DE-111, 3(a).

(4) *Determine required jurisdictional facts: death, domicile or property in California, and proper publication of notice.* Prob C §8005(b).

(5) *Determine whether there is a will or whether decedent died intestate.* Petition for Probate, Judicial Council Form DE-111, 3(e). *If there is a will, determine whether it is self-proving, Petition for Probate, Judicial Council Form DE-111, 3(e). If it is not self-proving, determine whether there is adequate proof of proper execution of will.* See §302.18.

(6) *If will is proved and no objection made to will, admit will to probate.*

(7) *Determine who to appoint as personal representative.* Petition for Probate, Judicial Council Form DE-111, 3(f), (g); see §§302.19–302.24.

(8) *Determine whether authority under the Independent Administration of Estates Act (IAEA) is sought.* Prob C §§10400 et seq; Petition for Probate, Judicial Council Form DE-111, 2(c), 4. *Determine whether such authority should be granted or is precluded by will provision.* Prob C §§10404, 10452. *Determine whether to grant full or limited authority.* See §302.28.

(9) *Determine whether bond waived by will or heirs, and if not, determine amount of bond based on value of personal property and gross annual income.* Prob C §§8480 et seq, Petition for Probate, Judicial Council Form DE-111, 2(d), 3(d); see §§302.25–302.26. *If full IAEA authority is sought, Petition for Probate, Judicial Council Form DE-111, 2(d), 4, include estimated value of the decedent's interest in the real property authorized to be sold under the IAEA in bond amount.* Prob C §10453; see §302.26.

Note: Amount of bond is reduced by deposits in blocked accounts. Prob C §8483(b).

(10) *Appoint probate referee.* Prob C §§8920 et seq; see §302.65.

(11) *Review proposed court order form to ensure that it reflects the decision and orders you made.* Judicial Council Required Form DE-140.

C. [§302.4] Inventory

(1) *Determine whether inventory and appraisal have been timely filed (four months after letters issued or later as allowed by court).* Prob C §8800(b); see §302.58.

(2) *Determine whether copy of inventory was mailed to every person who has requested special notice.* Prob C §8803; see §302.58.

(3) *If a timely petition for waiver of appraisal by the probate referee has been filed, hold hearing after proper notice is given and within the required 15 days after the filing of the petition.* Prob C §8903(c); see §302.66.

(4) *Determine whether waiver should be granted, and if the opposition fails and you determine that the opposition by referee was made without substantial justification, award litigation expenses, including reasonable attorney's fees, against the probate referee. If the opposition succeeds and a waiver is not granted, you may designate a different probate referee to appraise property in the estate.* Prob C §8903(d); see §302.68.

(5) *Determine whether assets have been appraised by the appropriate person, representative, probate referee, or independent expert.* Prob C §§8900 et seq; see §302.64.

(6) *If an objection to an appraisal has been filed, set a time for a hearing not less than 15 days after the filing of the objection.* Prob C §8906(a), (b); see §302.68.

(7) *Determine whether proper notice of the hearing was given under Prob C §1200 and whether notice was given to the appraiser, if required.* Prob C §8906(c); see §302.68.

(8) *At the hearing, make any orders that you deem appropriate.* Prob C §8906(e); see §302.68.

(9) *If you determine that the objection was filed without reasonable cause or good faith, order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection.* Prob C §8906(e); see §302.68.

(10) *If inventory has not been timely filed and an interested person petitions, order the representative to file the inventory and appraisal, remove the representative, or order that the representative is liable for damages.* Prob C §8804; see §302.61.

D. [§302.5] Confirmation of Sale of Real Property

(1) *Determine whether Report of Sale and Petition for Order Confirming Sale of Real Property (Judicial Council Form DE-260) has been timely filed.* Prob C §10308(a); see §302.126.

(2) *Determine whether proper notice of the hearing on the petition has been given.* Prob C §10308(c); see §302.126.

(3) *Determine whether an objection to the sale has been filed. If filed, hold hearing and receive evidence.* Prob C §10310(c); see §302.128.

(4) *Determine whether Judicial Council Form DE-260, 2, properly describes property sold.* Prob C §10304(a); see §302.122.

(5) *Determine whether current appraisal has been made.* Judicial Council Form DE-120, 3; Prob C §10309(a); see §302.127.

(6) *Determine the manner of sale, public or private, and whether statutory requirements were met.* Judicial Council Form DE-260, 4; Prob C §§10304(a), 10305; see §302.126.

(7) *Determine whether potential purchasers were given an opportunity to inspect the property, and if not, consider postponing the hearing.* Cal Rules of Ct 7.451; see §302.128.

(8) *Determine the commission to be paid to the broker.* Judicial Council Form DE-260, 5; Prob C §§10160 et seq; see §302.136.

(9) *Determine whether increase in bond required.* Judicial Council Form DE-260, 6; Prob C §8482(d); see §302.26.

(10) *Determine whether notice of sale was properly given and published, if required.* Judicial Council Form DE-120, 7, 8; Prob C §10312; see §302.130.

(11) *Determine whether proper reason for sale exists.* Judicial Council Form DE-260, 9; Prob C §10000; see §302.105.

(12) *Determine whether the petitioner's attorney or petitioner, if unrepresented, is present, and if not, postpone the hearing.* Cal Rules of Ct 7.452; see §302.128.

(13) *Determine amount of required overbid and ask for and receive overbids.* Judicial Council Form DE-260, 10, 11; Prob C §10311; see §302.129.

(14) *If overbid, determine that it is sufficient and has been reduced to writing and determine whether to accept overbid.* Prob C §10311; see §302.129.

(15) *Determine the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable.* Judicial Council Form DE-260, 12; Prob C §10310(b); see §302.128.

(16) *Determine if the sale was legally made and fairly conducted and the amount for which the sale is to be confirmed is not disproportionate to the value of the property.* Prob C §10313(a); see §302.130.

(17) *If sale is properly made, enter order of sale* (Judicial Council Form DE-265), *making the required findings therein.* Prob C §§10312, 10313; see §302.130.

E. [§302.6] Petition for Approval of Account

(1) *Determine whether account has been timely filed after court order.* Prob C §10901; see §302.157.

(2) *Determine whether proper notice of the hearing on the petition for approval of account has been given.* Prob C §11000; see §302.162.

(3) *Determine whether proper account and supporting documents have been filed.* Prob C §§10900, 1060 et seq; see §302.158.

(5) *Determine whether a contest to the account has been filed.* Prob C §11001; see §302.164.

(6) *If contest filed, hold hearing and cite the representative to attend.* Prob C §11002(a); see §302.164.

(7) *If appropriate, appoint referee to examine account and make report.* Prob C §11002(b); see §302.164.

(8) *Make appropriate orders on contest and approval of account.* Prob C §11002(c); see §302.164.

(9) *If you determine that the contest was without reasonable cause and in bad faith, award the personal representative the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to defend the account.* Prob C §11003(a); see §302.164.

(10) *If you determine that the opposition to the contest was without reasonable cause and in bad faith, award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account.* Prob C §11003(b); see §302.164.

(11) *If account has not been timely filed, have a citation served on the representative requiring the representative to show cause why the representative should not be punished for contempt.* Prob C §§11050, 11051(a); see §302.168.

(12) *If the personal representative does not appear and file a required account, punish the representative for contempt or remove from office, or both, in your discretion.* Prob C §11052; see §302.168.

F. [§302.7] Petitions for Final Distribution and Discharge

(1) *When the petition for final distribution is filed, determine whether proper notice of the hearing has been given.* Prob C §§11601, 1220; Notice of Hearing, Judicial Council Form DE-120; see §302.190.

(2) *Determine whether the petition properly lists and describes the property to be distributed.* Cal Rules of Ct 7.651, 7.652; see §302.190.

(3) *Determine if there is opposition to the distribution (Prob C §11602), and if there is, determine whether the distribution should be approved or approved as amended.* See §302.191.

(4) *Determine whether all debts have been paid or adequately provided for (Prob C §11640(a)), and whether the petition adequately describes the disposition of each claim.* Cal Rules of Ct 7.403; see §302.202.

(5) *Make an order for final distribution and have it entered in a judgment book or other permanent record of the court.* Prob C §1048(b); see §302.206.

(6) *When the ex parte petition for final discharge and order is filed (Judicial Council Form DE-295), determine whether the representative has complied with the terms of the order for final distribution and has filed the appropriate receipts or the court has excused the filing of a receipt. If so, execute order in form discharging the personal representative and sureties from all liability incurred thereafter.* Prob C §12250(a); see §302.210.

III. APPLICABLE LAW

A. Initiating the Proceeding

1. [§302.8] Jurisdiction and Venue

The Superior Court has jurisdiction of Probate Code proceedings for the administration of a decedent's estate. Prob C §7050. Courts in most counties have probate departments where probate cases are heard.

If a decedent was domiciled in California at the time of death, the proper county for proceedings for administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died. Prob C §7051.

If the decedent was not domiciled in California at the time of death, the proper county for proceedings for the administration of the decedent's estate is one of the following (Prob C §7052):

- If property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died, the county in which the nondomiciliary decedent died.
- If no property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died or if the nondomiciliary decedent did not die in this state, any county in which property of the nondomiciliary decedent is located, regardless of where the nondomiciliary decedent died. If property of the nondomiciliary decedent is located in more than one county, the proper county is the county in which a petition for ancillary administration is first filed, and the court in that county has jurisdiction of the administration of the estate.

"Property" means anything that may be the subject of ownership and includes both real and personal property and any interest therein. Prob C §62.

2. [§302.9] Initiation by Petition

At any time after a decedent's death, any interested person may commence proceedings to administer the decedent's estate by a petition to the court for an order determining the date and place of the decedent's death and for either or both of the following (Prob C §8000(a)):

- Appointment of a personal representative.
- Probate of the decedent's will.

An "interested person" includes any of the following (Prob C §48(a)):

- An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent that may be affected by the proceeding.
- Any person having priority for appointment as personal representative (see §302.19).
- A fiduciary representing an interested person.

A petition for probate of the decedent's will may be made regardless of whether the will is in the petitioner's possession or is lost, destroyed, or beyond the jurisdiction of the state. Prob C §8000(b).

The petition must contain all of the following information (Prob C §8002(a)):

- The date and place of the decedent's death.
- The street number, street, and city, or other address, and the county of the decedent's residence at the time of death.

- The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner.
- The character and estimated value of the property in the estate.
- The name of the person for whom appointment as personal representative is petitioned.

The required form is Judicial Council Form DE-111.

If the decedent left a will or a will and codicil, the petitioner must attach a photographic copy to the petition. In the case of a holographic will or other will of which material provisions are handwritten, the petitioner must also attach a typed copy of the will. Prob C §8002(b)(1).

If the will is in a foreign language, the petitioner must attach an English language translation. On admission of the will to probate, the court certifies to a correct translation into English, and the certified translation is filed with the will. Prob C §8002(b)(2).

The petition must state whether the person named as executor in the will consents to act or waives the right to appointment. Prob C §8002(b)(3).

3. [§302.10] Hearing Date

The hearing on the petition must be set for a day not less than 15 nor more than 30 days after the petition is filed. At the request of the petitioner made at the time the petition is filed, the hearing on the petition is set for a day not less than 30 nor more than 45 days after the petition is filed. The court may not shorten the time for giving the notice of hearing. Prob C §8003(a).

4. Notice and Publication

a. [§302.11] Notice of Hearing

The petitioner must serve and publish notice of the hearing. Prob C §8003(b). The required form of notice is Judicial Council Form DE-121. See Prob C §8100 (statutory requirements for form).

At least 15 days before the hearing of a petition for administration of a decedent's estate, the petitioner must serve notice of the hearing by mail or personal delivery on all of the following persons (Prob C §8110):

- Each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner. "Reasonably ascertainable" must be given a broad meaning, sufficient to include individuals (1) whose identities are known to the petitioner and (2) who reasonably might be heirs. Only then can a neutral decision maker, the court, adjudicate the merits of their claim to heirship. Any other rule makes the petitioner for administration a judge in his or her own cause. *In re Estate of Carter* (2003) 111 CA4th 1139, 1142, 4 CR3d 490 (potential heirs were required to be noticed when petitioner knew they had lived with decedent who thought of them to be his children); see *Tulsa Professional Collection Servs., Inc. v Pope* (1988) 485 US 478, 108 S Ct 1340, 99 L Ed 2d 565 (reasonably ascertainable standard required for due process).

- Each devisee, executor, and alternative executor named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument.

The court may not shorten the time for giving the notice of hearing. Prob C §8003(a).

If the decedent's will involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, notice of hearing accompanied by a copy of the petition and of the will shall be served on the Attorney General as provided in Prob C §1209. Prob C §8111.

If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, notice may need to be given to heirs of the predeceased spouse. Prob C §6402.5.

b. [§302.12] Service of Notice

The notice or other paper must be sent by (Prob C §1215(b)):

- First-class mail if the person's address is within the United States. First-class mail includes certified, registered, and express mail.
- Airmail if the person's address is not within the United States.

The notice or other paper must be deposited for collection in the United States mail, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed. Prob C §1215(c).

The notice or other paper is addressed to the person at the person's place of business or place of residence. Prob C §1215(d). However, unless the court dispenses with the notice, if the address of the person to whom a notice or other paper is required to be mailed or delivered is not known, notice shall be given as the court may require in the manner provided in CCP §413.30 (in a manner that is reasonably calculated to give actual notice to the party to be served). Prob C §1212.

When the notice or other paper is deposited in the mail, mailing is complete and the period of notice is not extended. Prob C §1215(e).

Proof of service by mail is made by Judicial Council Form DE-121(MA).

If a notice or other paper is required or permitted to be mailed to a person, it may be delivered personally to that person. Personal delivery satisfies a provision that requires or permits a notice or other paper to be mailed. Prob C §1216(a). Personal delivery is complete when the notice or other paper is delivered personally to the person who is to receive it. Prob C §1216(b).

A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. Prob C §1204.

c. [§302.13] Publication of Notice

In addition to service of the notice of hearing, notice of hearing of a petition to administer a decedent's estate must also be published before the hearing. Prob C §8120. The first publication date of the notice must be at least 15 days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days

intervening between the first and last publication dates, not counting the publication dates, are sufficient. Prob C §8121(a).

Instructions for publication are contained in the notice of hearing, Judicial Council Form DE-121; see Prob C §8123 (caption type size).

Notice must be published in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction under Prob C §7052. If there is no such newspaper, or if the decedent did not reside in a city, or if the property is not located in a city, then notice must be published in a newspaper of general circulation in the county that is circulated within the area of the county in which the decedent resided or the property is located. If there is no such newspaper, notice must be published in a newspaper of general circulation published in this state nearest to the county seat of the county in which the decedent resided or the property is located, and which is circulated within the area of the county in which the decedent resided or the property is located. Prob C §8121(b).

A petition to administer a decedent's estate may not be heard by the court unless an affidavit showing due publication of the notice of hearing has been filed with the court. The affidavit must contain a copy of the notice and state the date of its publication. Prob C §8124. The affidavit is made by the printer. CCP §1020.

Proper publication of notice is a jurisdictional requirement. Prob C §8005(b).

5. Hearing

a. [§302.14] Matters To Be Established

At the hearing on the petition, the court may examine and compel any person to attend as a witness concerning any of the following matters (Prob C §8005(a)):

- The time, place, and manner of the decedent's death.
- The place of the decedent's domicile and residence at the time of death.
- The character and value of the decedent's property.
- Whether the decedent left a will.

The following matters must be established at the hearing (Prob C §8005(b)):

- The jurisdictional facts, including:
 - The date and place of the decedent's death.
 - That the decedent was domiciled in this state or left property in this state at the time of death.
 - The publication of notice.
- The existence or nonexistence of the decedent's will.
- That notice of the hearing was properly served.

An interested person may appear and make a response or objection in writing at or before the hearing. Prob C §1043(a); see Prob C §48 (definition of interested person). The court in its discretion may either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of allowing a response or objection to be made in writing. Prob C §1043(b).

b. [§302.15] Court Finding and Order

If the court finds that the matters referred to in Prob C §8005(b)(1) (jurisdictional facts; see §302.14) have been established, the court makes an order determining the time and place of the decedent's death and the jurisdiction of the court. Where appropriate and on satisfactory proof, the order admits the decedent's will to probate (see §302.16) and appoints a personal representative (see §302.16). The date the will is admitted to probate is included in the order. Prob C §8006(a).

If through defect of form or error the jurisdictional facts are incorrectly stated in the petition but actually are established, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding. Prob C §8006(b).

The order should appoint a probate referee. The referee appraises all property not appraised by the personal representative. Prob C §8902(b); see §302.65. There may be local forms for appointment of the referee.

The required form of court order is Judicial Council Form DE-140.

c. [§302.16] Effect of Court Order

Except as provided below, an order admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked. Prob C §8007(a).

This conclusive determination is not applicable in either of the following cases (Prob C §8007(b)):

- The presence of extrinsic fraud in the procurement of the court order.
- The court order is based on the erroneous determination of the decedent's death.

6. Proof of Will**a. [§302.17] Production of Will**

Unless a petition for probate of the will is earlier filed, the custodian of a will must, within 30 days after having knowledge of the death of the testator, do both of the following (Prob C §8200(a)):

- Deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered.
- Mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the custodian.

The clerk releases a copy of a will for attachment to a petition for probate of the will or otherwise on receipt of payment of the required fee and either a court order for production of the will or a certified copy of a death certificate of the decedent. Prob C §8200(c).

b. [§302.18] Proof

A will may be contested by filing an objection to the will. Prob C §8250.

Unless there is a contest of a will, the will may be proved on the evidence of one of the subscribing witnesses only, if the evidence shows that the will was executed in all particulars as prescribed by law. Prob C §8220(a).

Evidence of execution of a will may be received by an affidavit of a subscribing witness to which there is attached a photographic copy of the will, or by an affidavit in the original will that includes or incorporates the attestation clause. Prob C §8220(b). The required form of affidavit of subscribing witness is Judicial Council Form DE-131.

If no subscribing witness resides in the county, but the deposition of a witness can be taken elsewhere, the court may direct the deposition to be taken. On the examination, the court may authorize a photographic copy of the will to be made and presented to the witness, and the witness may be asked the same questions with respect to the photographic copy as if the original will were present. Prob C §8220(c).

If no subscribing witness is available as a witness within the meaning of Evid C §240, the court may, if the will on its face conforms to all requirements of law, permit proof of the will by proof of the handwriting of the testator and one of the following (Prob C §8221):

- Proof of the handwriting of any one subscribing witness.
- Receipt in evidence of one of the following documents reciting facts showing due execution of the will:
 - A writing in the will bearing the signatures of all subscribing witnesses.
 - An affidavit of a person with personal knowledge of the circumstances of the execution.

➡ **JUDICIAL TIP:** Most wills are “self-proving.” The required affidavit (declaration under penalty of perjury) by the subscribing witnesses is contained in the will and is sufficient for proof of the will under Prob C §8220(b). The Judicial Council affidavit of the subscribing witness thus need not be filed and the will itself is sufficient.

A holographic will may be proved in the same manner as other writings. Prob C §8222; see Evid C §§1400 et seq. The required form of affidavit to prove a holographic will is Judicial Council Form DE-135.

When the court admits a will to probate, that fact is recorded in the minutes by the clerk and the will is filed. Prob C §8225.

If no person contests the validity of a will or petitions for revocation of probate of the will 120 days after the will is admitted to probate (Prob C §8270(a); see §302.27), admission of the will to probate is conclusive, subject to Prob C §8007 (see §302.16). Prob C §8226(a).

7. Appointment of Personal Representative

a. [§302.19] No Power Before Appointment

A person has no power to administer the estate until the person is appointed the personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters. Prob C §8400(a); see §302.24. There is no power whether or not the person is named executor in the decedent's will, except that a person named executor in the decedent's will may, before the appointment is made or becomes effective, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate. Prob C §8400(b).

b. [§302.20] Appointment of Executor

The person named as executor in a decedent's will has the right to appointment as personal representative. Prob C §8420. If a person is not named as executor in a will but it appears by the terms of the will that the decedent intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment as personal representative in the same manner as if named as executor. Prob C §8421.

The decedent may have conferred on a person the power to designate an executor or coexecutor, or successor executor or coexecutor by will. The decedent's will may also provide that the persons so designated may serve without bond. Prob C §8422(a). This designation must be in writing and filed with the court. Unless the will provides otherwise, if there are two or more holders of the power to designate, the designation must be unanimous, unless one of the holders of the power is unable or unwilling to act, in which case the remaining holder or holders may exercise the power. Prob C §8422(b). Except as provided above, an executor does not have authority to name a coexecutor, or a successor executor or coexecutor. Prob C §8422(c).

c. [§302.21] Appointment of Administrator With Will Annexed

An administrator with the will annexed is appointed as personal representative if no executor is named in the will or if the sole executor or all the executors named in the will have waived the right to appointment or are for any reason unwilling or unable to act. Prob C §8440. Except as provided below, persons and their nominees are entitled to appointment as administrator with the will annexed in the same order of priority as for appointment of an administrator. Prob C §8441(a). There are specific provisions for the priority for appointment of an administrator. Prob C §§8461–8469. A person who takes under the will has priority over a person who does not, but the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the nominee of several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will. Prob C §8441(b).

An administrator with the will annexed has the same authority over the decedent's estate as an executor named in the will would have. Prob C §8442(a). However, if the will confers a discretionary power or authority on an executor that is not conferred by law and the will does not extend the power or authority to other personal representatives, the power or authority is not deemed to be conferred on an administrator with the will annexed, but the court in its discretion may authorize the exercise of the power or authority. Prob C §8442(b).

d. [§302.22] Appointment of Administrator

If the decedent dies intestate, the court appoints an administrator as personal representative. Prob C §8460(a). The court may appoint one or more persons as administrator. Prob C §8460(b). There are specific provisions for the priority for appointment of an administrator. Prob C §§8461–8469.

e. [§302.23] Persons Disqualified

Notwithstanding any statutory provisions, a person is not competent to act as personal representative in any of the following circumstances (Prob C §8402(a)):

- The person is under the age of majority.
- The person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute the duties of the office.
- There are grounds for removal of the person from office under Prob C §8502 (see §302.183). This provision enables the court to deny appointment of a personal representative if the personal representative would be subject to removal, for example, for a conflict of interest that is sufficient to require removal. California L Rev Comment to Prob C §8402.
- The person is not a resident of the United States.
- The person is a surviving partner of the decedent, and an interested person objects to the appointment.

The nonresident and surviving partner prohibitions do not apply to a person named as executor or successor executor in the decedent's will. Prob C §8402(b).

f. [§302.24] Oath and Letters

Before letters are issued, the personal representative must take and subscribe an oath to perform, according to law, the duties of the office. The oath may be taken and dated on or after the time the petition for appointment as personal representative is signed, and may be filed with the clerk at any time after the petition is granted. Prob C §8403(a).

The oath constitutes an acceptance of the office and is attached to or endorsed on the letters. Prob C §8403(b); see Judicial Council Form DE-150.

Before letters are issued, the personal representative (other than a trust company or a public administrator) must file an acknowledgment of receipt of a statement of duties and liabilities of the office of personal representative. Prob C §8404(a). The required forms of statement of duties are Judicial Council Forms DE-147 and DE-148.

Letters are signed by the clerk under the seal of the court and include (Prob C §8405):

- The county from which the letters are issued.
- The name of the person appointed as personal representative and whether the personal representative is an executor, administrator, administrator with the will annexed, or special administrator.
- A notation whether the personal representative is authorized to act under the Independent Administration of Estates Act (IAEA) (Prob C §§10400 et seq; see §302.28) and if so authorized, whether the independent administration authority includes or excludes the power to do any of the following:
 - Sell real property.
 - Exchange real property.
 - Grant an option to purchase real property.
 - Borrow money with the loan secured by an encumbrance upon real property.

The required form of letters is Judicial Council Form DE-150.

8. Bond

a. [§302.25] Requirement

Except as otherwise provided by statute, every person appointed as personal representative shall, before letters are issued, give a bond approved by the court. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several. Prob C §8480(a).

The bond is for the benefit of interested persons and is conditioned on the personal representative's faithful execution of the duties of the office according to law. Prob C §8480(b). If the person appointed as personal representative fails to give the required bond, letters may not be issued. If the person appointed as personal representative fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, under court order, the person may be removed from office. Prob C §8480(c).

A bond is not required in either of the following cases (Prob C §8481(a)):

- The will waives the requirement of a bond.
- All beneficiaries waive in writing the requirement of a bond, and the written waivers are attached to the petition for appointment of a personal representative. In practice, the waivers often are filed after the petition, but before the hearing. This waiver provision does not apply if the will requires a bond.

Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person or on its own motion, the court may for good cause require that a bond be given, either before or after issuance of letters. Prob C §8481(b).

The court may require bond if the proposed personal representative resides outside California or for other good cause, even if the will waives bond. Cal Rules of Ct 7.201(b).

The bond is limited to the value of personal property and any creditors' claims. See discussion at §302.26.

Because a corporate fiduciary cannot assume responsibility for the acts of an individual representative, an individual representative who is required to give a bond must provide a separate bond, except to the extent that the court orders the assets to be held solely by the corporate representative. Cal Rules of Ct 7.203.

b. [§302.26] Amount

The court in its discretion may fix the amount of the bond, but the amount of the bond may not be more than the sum of (Prob C §8482(a)):

- The estimated value of the personal property.
- The probable annual gross income of the estate.
- If independent administration is granted as to real property, the estimated value of the decedent's interest in the real property. See §302.28.

Notwithstanding the above, if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer. Prob C §8482(b).

If the bond is given by personal sureties, the amount of the bond is twice the amount fixed by the court. Prob C §8482(c).

If funds are deposited in blocked accounts with the condition that the property, including any earnings thereon, will not be withdrawn except on authorization of the court, the court may exclude the property deposited in determining the amount of the required bond or reduce the amount of the bond to be required in respect to the property deposited to such an amount as the court determines is reasonable. Prob C §8483(b).

☛ **JUDICIAL TIP:** Some judicial officers discourage the use of blocked accounts because financial institutions will not open a blocked account until letters are issued, which increases the risk that funds will not be deposited in the blocked account. And brokerage and securities firms either restrict blocked accounts or are unwilling to establish blocked accounts.

Before confirming a sale of real property, the court shall require such additional bond as may be proper, not exceeding the maximum bond requirements, treating the expected proceeds of the sale as personal property. Prob C §8482(d).

If the personal representative requests or has been granted an independent power to sell or hypothecate real estate or to lease it for a term of more than one year, the personal representative must state in the request to fix the amount of the bond the value of the real property less encumbrances. Cal Rules of Ct 7.205.

Immediately upon the occurrence of facts making it necessary or appropriate to increase the amount of the bond, the personal representative must make an ex parte application for an order increasing the bond. Cal Rules of Ct 7.204(a). If the personal representative has not already made application, the attorney for the personal representative must make the ex parte application immediately upon becoming aware of the need to increase bond. Cal Rules of Ct 7.204(b).

There are similar bond requirements if the representative is given authority under the IAEA. Prob C §10453. Note that if the representative is given authority to sell real property under the IAEA, the estimated value of the decedent's interest in that property must be included in the bond. Prob C §§8481, 10453; see §302.28.

The provisions of the Bond and Undertaking Law, CCP §§995.010 et seq, apply to the bond. Prob C §8487.

9. [§302.27] Petition for Revocation

Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest and other than a person who had actual notice of a will contest in time to have joined in the contest, may petition the court to revoke the probate of the will. The petition must include objections setting forth written grounds of opposition. Prob C §8270(a). Notwithstanding the above, a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution. Prob C §8270(b).

B. Independent Administration of Estates

1. [§302.28] Obtaining Authority

To obtain authority to administer the estate under the Independent Administration of Estates Act (IAEA), the personal representative petitions the court for that authority either in the petition for appointment of the personal representative or in a separate petition filed in the estate proceedings. Prob C §10450(a).

The personal representative may not be granted authority to administer the estate under IAEA if the decedent's will provides that the estate shall not be so administered. Prob C §10404. The will may also restrict the powers that the personal representative may exercise under the IAEA. Prob C §10502(b).

The petition may request either of the following (Prob C §10450(b)):

- Full authority to administer the estate under the IAEA.
- Limited authority to administer the estate under the IAEA.

In some cases, a significant saving in the bond premium can be realized by seeking only limited authority because the bond for limited authority does not include real property. Because of this consideration, limited authority ordinarily is sought only where a bond is required and the personal representative seeks to avoid the increased bond premium that is required when full authority is granted or if the personal representative cannot qualify for a bond. Accordingly, a personal representative who is not required to provide a bond almost always will request full authority; and a personal representative who is required to provide a bond for an estate that includes real property ordinarily will request limited authority unless the personal representative wishes to use independent administration authority for a sale of some or all of the real property or to borrow money secured by the real property. Cal L Rev Comment to Prob C §10450; see Prob C §10453.

If the authority to administer the estate under the IAEA is requested in the petition for appointment of the personal representative, notice of the hearing on the petition is

given for the period and in the manner applicable to the petition for appointment. Prob C §10451(a).

When proceedings for the administration of the estate are pending at the time of a petition, notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §10451(b)):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.
- Each person named as executor in the will of the decedent.

The notice of hearing of the petition for authority to administer the estate under the IAEA, whether included in the petition for appointment or in a separate petition, must include the substance of the following statement: “The petition requests authority to administer the estate under the Independent Administration of Estates Act. This will avoid the need to obtain court approval for many actions taken in connection with the estate. However, before taking certain actions, the personal representative will be required to give notice to interested persons unless they have waived notice or have consented to the proposed action. Independent administration authority will be granted unless good cause is shown why it should not be.” Prob C §10451(c).

Unless an interested person objects as provided below to the granting of authority to administer the estate and the court determines that the objecting party has shown good cause why the authority to administer the estate should not be granted, the court must grant the requested authority. If the objecting party has shown good cause why only limited authority should be granted, the court must grant only limited authority. Prob C §10452.

2. [§302.29] Petition To Revoke

Any interested person may file a petition requesting that the court make either of the following orders (Prob C §10454(a)):

- An order revoking the authority of the personal representative to continue administration of the estate under the IAEA.
- An order revoking the full authority of the personal representative to administer the estate under the IAEA and granting the personal representative limited authority to administer the estate under the IAEA.

The petition shall set forth the basis for the requested order. Prob C §10454(b).

Notice of the hearing on the petition is given as provided in Prob C §1220; see §302.44. In addition, the personal representative must be served with a copy of the petition and a notice of the time and place of the hearing at least 15 days prior to the hearing. Service on the personal representative is made in the manner provided in CCP §415.10 or §415.30 or in such manner as may be authorized by the court. Prob C §10454(c).

If the court determines that good cause has been shown, the court shall make an order revoking the authority of the personal representative to continue administration of

the estate under the IAEA. Upon the making of the order, new letters are issued. Prob C §10454(d).

If the personal representative was granted full authority and the court determines that good cause has been shown, the court must make an order revoking the full authority and granting the personal representative limited authority. Upon the making of the order, new letters are issued that are required when the authority granted is limited authority. Prob C §10454(e).

3. Authority and Power

a. [§302.30] Authority To Act Without Supervision

Subject to the limitations and conditions set forth below, a personal representative who has been granted authority to administer the estate under the IAEA may administer the estate as provided in the IAEA without court supervision, but in all other respects the personal representative must administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate under the IAEA. Prob C §10500(a).

However, the personal representative may obtain court supervision of any action to be taken by the personal representative during administration of the estate. Prob C §10500(b). When the personal representative decides to obtain court supervision of an action and no other procedure is provided by statute for court supervision of the particular proposed action, the personal representative may petition for instructions under Prob C §9611; see §302.88. Cal L Rev Comment to Prob C §10500.

b. [§302.31] When Court Supervision Required

Whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under the IAEA is required to obtain court supervision for any of the following actions (Prob C §10501(a)):

- Allowance of the personal representative's compensation.
- Allowance of compensation of the attorney for the personal representative.
- Settlement of accounts.
- Subject to Prob C §10520, preliminary and final distributions and discharge.
- Sale of property of the estate to the personal representative or to the attorney for the personal representative.
- Exchange of property of the estate for property of the personal representative or for property of the attorney for the personal representative.
- Grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative.
- Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.
- Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.

- Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate.

The term “the attorney for the personal representative” is used in a broad sense and includes the associates, partners, and attorneys of counsel with the law firm of the attorney selected by the personal representative and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney selected by the personal representative. Cal L Rev Comment to Prob C §10501.

For the last six transactions listed above (starting with Sale), the supervision requirement does not apply to a transaction between the personal representative as such and the personal representative as an individual when all of the following requirements are satisfied (Prob C §10501(c)):

- Either the personal representative is the sole beneficiary of the estate or all the known heirs or devisees have consented to the transaction.
- The period for filing creditor claims has expired.
- No request for special notice is on file, or all persons who filed a request for special notice have consented to the transaction.
- The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

A personal representative who has obtained only limited authority to administer the estate under the IAEA is required to obtain court supervision, in the manner provided in this code, for any of the following actions (Prob C §10501(b)):

- Sale of real property.
- Exchange of real property.
- Grant of an option to purchase real property.
- Borrowing money with the loan secured by an encumbrance upon real property.

c. [§302.32] Powers Granted

A personal representative who has been granted authority to administer the estate under the IAEA has the powers described in Prob C §§10510 et seq (powers exercisable only after giving notice of proposed action), Prob C §§10530 et seq (powers, which require giving notice of proposed action under some circumstances before being exercised), and Prob C §§10550 et seq (powers exercisable without giving notice of proposed action). Prob C §10502(a). The will may restrict the powers that the personal representative may exercise under the IAEA. Prob C §10502(b).

When the personal representative exercises the authority to sell property of the estate under the IAEA, the personal representative may sell the property either at public auction or private sale, and with or without notice, for such price, for cash or on credit, and upon such terms and conditions as the personal representative may determine. The requirements applicable to court confirmation of sales of real property (including, but not limited to, publication of notice of sale, court approval of agents’ and brokers’

commissions, sale at not less than 90 percent of appraised value, and court examination into the necessity for the sale, advantage to the estate and benefit to interested persons, and efforts of the personal representative to obtain the highest and best price for the property reasonably attainable), and the requirements applicable to court confirmation of sales of personal property, do not apply to the sale. Prob C §10503.

4. Notice of Proposed Action and Objection

a. [§302.33] Notice of Proposed Action

A personal representative who has been granted authority to administer the estate under the IAEA must give notice of proposed action (see §302.28) before taking the proposed action without court supervision if Prob C §§10500 et seq, giving the personal representative the power to take the action, so requires. Prob C §10580(a).

A personal representative who has been granted authority to administer the estate under the IAEA may give notice of proposed action as provided in §302.28 even if the provision giving the personal representative the power to take the action permits the personal representative to take the action without giving notice of proposed action. Prob C §10580(b).

The required Judicial Council form of Notice Proposed Action is Form DE-165.

b. [§302.34] To Whom Notice Given

Notice of proposed action is given to all of the following (Prob C §10581):

- Each known devisee whose interest in the estate would be affected by the proposed action.
- Each known heir whose interest in the estate would be affected by the proposed action.
- Each person who has filed a request under Prob C §1250 (see §302.44) for special notice of petitions filed in the administration proceeding.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the proposed action.

c. [§302.35] Consent and Waiver

Notice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken. Prob C §10582. The required Notice of Proposed Action form contains a form to consent to the action. Judicial Council Form DE-165.

Notice of proposed action also need not be given to any person who, in writing, waives the right to notice of proposed action with respect to the particular proposed action. The waiver may be executed at any time before or after the proposed action is taken. The waiver describes the particular proposed action and may waive particular aspects of the notice, such as the delivery, mailing, or time requirements of Prob C §10586, or the giving of the notice in its entirety for the particular proposed action. Prob C §10583(a).

Finally, notice of proposed action need not be given to any person who has executed the Statutory Waiver of Notice of Proposed Action Form (required Judicial Council Form DE-166) and in that form has made either of the following (Prob C §10583(b)):

- A general waiver of the right to notice of proposed action, or
- A waiver of the right to notice of proposed action for all transactions of a type that includes the particular proposed action.

A waiver or consent may be revoked only in writing and is effective only when the writing is received by the personal representative. Prob C §10584(a). A copy of the revocation may be filed with the court, but the effectiveness of the revocation is not dependent upon a copy being filed with the court. Prob C §10584(b). The required form of revocation of waiver is Judicial Council Form DE-166.

d. [§302.36] Delivery of Notice

The notice of proposed action must be mailed or personally delivered to each person required to be given notice of proposed action not less than 15 days before the date specified in the notice of proposed action on or after which the proposed action is to be taken. If mailed, the notice of proposed action is addressed to the person at the person's last known address. Probate Code §§1215 and 1216 (see §302.12) apply to the mailing or delivery of the notice of proposed action. Prob C §10586.

e. [§302.37] Objection

Any person entitled to notice of proposed action under Prob C §10581 may object to the proposed action. Prob C §10587(a). A person entitled to notice but not noticed may object. Cal L Rev Comment to Prob C §10587. The objection to the proposed action is made by delivering or mailing a written objection to the proposed action to the personal representative at the address stated in the notice of proposed action. The person objecting to the proposed action either may use Judicial Council Form DE-165 or may make the objection in any other writing that identifies the proposed action with reasonable certainty and indicates that the person objects to the taking of the proposed action. Prob C §10587(b).

The personal representative is deemed to have notice of the objection to the proposed action if it is delivered or received at the address stated in the notice of proposed action before whichever of the following times is the later (Prob C §10587(c)):

- The date specified in the notice of proposed action on or after which the proposed action is to be taken.
- The date the proposed action is actually taken.

f. [§302.38] Restraining Order

Any person who is entitled to or given notice of proposed action may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision. The court must grant the requested order without requiring notice to the personal representative and without cause being shown for the order. Prob C §10588(a).

The personal representative is deemed to have notice of the restraining order if it is served upon the personal representative in the same manner as is provided for in CCP §415.10 or §415.30 (see §302.30), or in the manner authorized by the court, before whichever of the following times is the later (Prob C §10588(b)):

- The date specified in a notice of proposed action on or after which the proposed action is to be taken.
- The date the proposed action is actually taken.

5. [§302.39] Obtaining Court Supervision

If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under the IAEA and the personal representative has notice of a written objection to the proposed action or a restraining order, the personal representative must, if the personal representative desires to take the proposed action, take the proposed action under the statutory provisions dealing with court supervision of that kind of action. Prob C §10589(a).

If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under the IAEA but the personal representative has given notice of the proposed action and has notice of a written objection to the proposed action or a restraining order issued, the personal representative must, if he or she desires to take the proposed action, request instructions from the court concerning the proposed action. The personal representative may take the proposed action only under such order as may be entered by the court. Prob C §10589(b).

A person who objects to a proposed action or serves a restraining order issued under Prob C §10588 must be given notice of any hearing on a petition for court authorization or confirmation of the proposed action. Prob C §10589(c). See §302.41 for discussion of the validity of a transaction done without court supervision

6. [§302.40] Review After Action Taken

Except as provided below, only a person entitled to notice (Prob C §10581) has a right to have the court review the proposed action after it has been taken or otherwise to object to the proposed action after it has been taken. A person waives the right to have the court review the proposed action after it has been taken, or otherwise to object to the proposed action after it has been taken, if either of the following circumstances exists (Prob C §10590(a)):

- The person has been given notice of a proposed action and fails to object.
- The person has waived notice of or consented to the proposed action as provided.

An objection to a proposed action can be made only by one or both of the following methods (Prob C §10590(d)):

- Delivering or mailing a written objection as provided in Prob C §10587 within the time specified therein.
- Serving a restraining order obtained under Prob C §10588 in the manner prescribed and within the time specified therein.

A creditor who does not request special notice is not entitled to notice of proposed action (see Prob C §10581) and is not entitled to obtain review of an action taken. Cal L Rev Comment to Prob C §10590.

Unless the person has waived notice of or consented to the proposed action, the court may review the action taken upon motion of a person who is entitled to notice (Prob C §10581) who establishes that he or she did not actually receive the notice of proposed action before the time to object expired. Prob C §10590(b).

The court also may review the action of the personal representative upon motion of an heir or devisee who establishes all of the following (Prob C §10590(c)):

- At the time the notice was given, the heir or devisee lacked capacity to object to the proposed action or was a minor.
- No notice of proposed action was actually received by the guardian, conservator, or other legal representative of the heir or devisee.
- The guardian, conservator, or other legal representative did not waive notice of proposed action.
- The guardian, conservator, or other legal representative did not consent to the proposed action.

7. [§302.41] Validity of Action

If the personal representative does not comply with Prob C §10580(a) (notice) or with Prob C §§10581, 10585, 10586, and 10589 (see §302.42), and the failure to comply does not affect the validity of an action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons who, dealing in good faith with the personal representative, changed their position in reliance upon the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions. Prob C §10591(a).

No person dealing with the personal representative has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed in Prob C §10591(a). Prob C §10591(b).

In such a situation the personal representative may be subject to two sanctions. First, the personal representative can be surcharged if the personal representative violates the standard of ordinary care and diligence established by Prob C §9600. In view of the objection, the burden is on the personal representative to establish that the action taken satisfied the requirements of Prob C §9600. Second, taking an action without obtaining court supervision when there has been an objection to the proposed action is grounds for removal of the personal representative. See Prob C §10592; see §302.42. If the objection was made by serving a restraining order with respect to the proposed action, the personal representative also would be subject to sanctions for violation of the court order. Cal L Rev Comment to Prob C §10589.

8. [§302.42] Removal of Personal Representative

In a case where notice of proposed action is required, the court in its discretion may remove the personal representative from office unless the personal representative does one of the following (Prob C §10592(a)):

- Gives notice of proposed action as provided.
- Obtains a waiver of notice of proposed action.
- Obtains a consent to the proposed action.

The court in its discretion may remove the personal representative from office if the personal representative takes a proposed action in violation of Prob C §10589 (supervision; see §302.39). Prob C §10592(b). In determining whether to remove the personal representative, the court should consider all the circumstances of the particular case. Among the significant considerations are whether the personal representative violated the statute with the intent to deprive the person entitled to notice of his or her rights or whether the failure was inadvertent or merely negligent. Cal L Rev Comment to Prob C §10592.

9. [§302.43] Report in Accounting

In any accounting, report, petition for preliminary distribution, or petition for final distribution, the petitioner must list and describe all actions taken without prior court approval under the IAEA if notice of the proposed action was required. The description of the action must include the following (Cal Rules of Ct 7.250(a)):

The nature of the action;

- When the action was taken;
- A statement of when and to whom notice was given;
- Whether notice was waived, and if so, by whom; and
- Whether any objections were received.

C. Notice

1. [§302.44] General Notice Provisions

Generally a notice of a hearing must be mailed, at least 15 days before the time set for the hearing to the persons required to be given notice. Prob C §1220(a)(1).

The required form of notice is Judicial Council Form DE-120.

Unless the statute requiring notice specifies the persons to be given notice, notice is mailed to all of the following (Prob C §1220(a)(2)):

- The personal representative.
- All persons who have requested special notice in the estate proceeding under Prob C §1250 (see §302.47).

The notice must be addressed to the person required to be given notice at the person's place of business or place of residence. Prob C §1220(a)(3). Unless the court dispenses with the notice, if the address of the person to whom a notice or other paper is

required to be mailed or delivered is not known, notice is given as the court may require in the manner provided in CCP §413.30. Prob C §1212.

This notice requirement does not excuse compliance with the requirements for notice to a person who has requested special notice under Prob C §1250. Prob C §1220(b); see §302.47.

The court for good cause, however, may dispense with the notice otherwise required to be given to a person. Prob C §1220(c); see §302.45.

If notice is required to be given to known heirs or known devisees, it is given to the following persons (Prob C §1206(a)):

- If the estate is an intestate estate, to the heirs named in the petition for letters of administration and to any additional heirs who become known to the person giving the notice before the giving of the notice.
- If the estate is a testate estate, to the devisees named in the petition for probate of the will and to any additional devisees who become known to the person giving the notice before the giving of the notice.

Notice need not be given to a person if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt. Prob C §1206(b).

2. [§302.45] Dispensing With Notice

If a person entitled to notice cannot be located after diligent search, the court may prescribe the manner of giving notice to that person or may dispense with notice to that person. Cal Rules of Ct 7.52(c).

The required form for prescribing notice is Judicial Council Form DE-200.

Petitioner must file a declaration describing efforts made to locate a person entitled to notice, but whose address is unknown, before the court will prescribe an alternate form of notice or dispense with notice. The declaration must state (Cal Rules of Ct 7.52(a)):

- The name of the person whose address is unknown,
- The last known address of the person,
- The approximate date when the person was last known to reside there,
- The efforts made to locate the person, and
- Any facts that explain why the person's address cannot be obtained.

The declaration must include a description of the attempts to learn of the person's business and residence addresses by (Cal Rules of Ct 7.52(a)):

- Inquiry of the relatives, friends, acquaintances, and employers of the person entitled to notice and of the person who is the subject of the proceeding;
- Review of appropriate city telephone directories and directory assistance; and
- Search of the real and personal property indexes in the recorder's and assessor's offices for the county where the person was last known or believed to reside.

3. [§302.46] Waiver of Notice

A person, conservator, trustee, or other fiduciary may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. Prob C §1204.

4. [§302.47] Special Notice

At any time after the issuance of letters in a proceeding for the administration of a decedent's estate, any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a trust, or as otherwise interested, may in person or by attorney, file with the court clerk a written request for special notice. Prob C §1250(a).

The request for special notice must be so entitled and must set forth the name of the person and the address to which notices are to be sent. Prob C §1250(b). The required form of request for special notice is Judicial Council Form DE-120.

Special notice may be requested of one or more of the following matters (Prob C §1250(c)):

- Petitions filed in the administration proceeding.
- Inventories and appraisals of property in the estate, including any supplemental inventories and appraisals.
- Objections to an appraisal.
- Accounts of a personal representative.
- Reports of status of administration.

A copy of the request must be personally delivered or mailed to the personal representative or to the attorney for the personal representative. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received. Prob C §1250(e).

A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request. Prob C §1251.

Unless the court makes an order dispensing with the notice, if a request has been made for special notice of a hearing, the person filing a petition, report, account, or other paper must give written notice of the filing, together with a copy of the petition, report, account, or other paper, and the time and place set for the hearing, by mail to the person named in the request at the address set forth in the request, at least 15 days before the time set for the hearing. Prob C §1252(a).

If a request has been made for special notice of the filing of an inventory and appraisal of the estate or of the filing of any other paper that does not require a hearing, the inventory and appraisal or other paper must be mailed not later than 15 days after the inventory and appraisal or other paper is filed with the court. Prob C §1252(b).

An ex parte application for an order must allege whether special notice has been requested. Cal Rules of Ct 7.55(a). If special notice has been requested, the application must identify each person who has requested special notice and must allege that special notice has been given to or waived by each person who has requested it. Cal Rules of Ct 7.55(b). Proofs of service of special notice or written waivers of special notice must be filed with the application. Cal Rules of Ct 7.55(c).

D. Family Protection

1. [§302.48] Temporary Possession of Dwelling and Personal Property

Until the inventory is filed and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefore, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment. Prob C §6500.

Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may set apart all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling, to any one or more of the following (Prob C §6510):

- The surviving spouse.
- The minor children of the decedent.

Personal property exempt from execution is specified in CCP §§704.010 et seq and is listed in Judicial Council Form EJ-155.

A petition for such orders may be filed by any interested person. Notice of the hearing on the petition is given as provided in Prob C §1220; see §302.44; Prob C §§6501, 6511.

The right of a surviving spouse to a set aside may be waived in whole or in part, whether the waiver is executed before or during marriage. Prob C §141(a)(4); see Prob C §§140–147.

2. [§302.49] Definition of Surviving Spouse

A surviving spouse includes the surviving registered domestic partner. Fam C §297.5(c).

“Surviving spouse” does not include any of the following (Prob C §78):

- A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.
- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.
- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.
- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

3. Family Allowance

a. [§302.50] Persons Entitled to Family Allowance

The following are entitled to such reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances during administration of the estate (Prob C §6540(a)):

- The surviving spouse of the decedent.
- Minor children of the decedent.
- Adult children of the decedent who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support.

The right of a surviving spouse to a family allowance may be waived in whole or in part, whether the waiver is executed before or during marriage. Prob C §141(a)(5); see Prob C §§140–147. The right to a family allowance depends on the surviving spouse's right to support from the deceased spouse, not the right to inherit. Therefore, a spouse living separate is entitled to an allowance unless the spouse is living separate by agreement, in which case the spouse is not entitled to support (Fam C §4302) and thus not entitled to a family allowance. *Estate of Hafner* (1986) 184 CA3d 1371, 1399–1400, 229 CR 676.

The purpose of the family allowance is to provide for the support of the persons designated in the statute during the period between the decedent's death and the distribution of the estate. *Parson v Parson* (1996) 49 CA4th 537, 540, 56 CR2d 686. Although a probate court generally has wide discretion in determining the amount of the allowance, the granting or withholding of a support allowance to a spouse and child is not discretionary if the assets of the estate are sufficient to satisfy prior charges. *Estate of Baldwin* (1961) 190 CA2d 78, 80, 11 CR 604.

b. [§302.51] Discretionary Family Allowance

The following may be given such reasonable family allowance out of the estate as the court in its discretion determines is necessary for their maintenance according to their circumstances during administration of the estate (Prob C §6540(b)):

- Other adult children of the decedent who were actually dependent in whole or in part upon the decedent for support.
- A parent of the decedent who was actually dependent in whole or in part upon the decedent for support.

c. [§302.52] Effect of Other Sources of Maintenance

If a person otherwise eligible for family allowance has a reasonable maintenance from other sources and there are one or more other persons entitled to a family allowance, the family allowance is granted only to those who do not have a reasonable maintenance from other sources. Prob C §6540(c).

d. [§302.53] Payable From Estate With Preferred Status

The allowance is payable from the estate and has a preferred status over wage claims and general debts. Prob C §11420(a); see §302.169. Because it is payable from the estate, it is not payable if there is no estate, such as when the decedent's property was all placed in a trust before death. *Parson v Parson* (1996) 49 CA4th 537, 541–542, 56 CR2d 686.

e. [§302.54] Petition to Grant or Modify

The court may grant or modify a family allowance on petition of any interested person. Prob C §6541(a).

With respect to an order for the family allowance for the spouse, minor children, and physically or mentally incapacitated adult dependent children (Prob C §6541(b)):

- Before the inventory is filed, the order may be made or modified either (A) ex parte or (B) after notice of the hearing on the petition has been given as provided in Prob C §1220 (see §302.44).
- After the inventory is filed, the order may be made or modified only after notice of the hearing on the petition has been given as provided in Prob C §1220 (see §302.44).

An order for a family allowance for other adult children and parents may be made only after notice of the hearing on the petition has been given as provided in Prob C §1220 to all of the following persons (Prob C §6541(c)):

- Each person listed in Prob C §1220 (see §302.44).
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.

f. [§302.55] Duration of Allowance

A family allowance commences on the date of the court's order or such other time as may be provided in the court's order, whether before or after the date of the order, as the court in its discretion determines. But the allowance may not be made retroactive to a date earlier than the date of the decedent's death. Prob C §6542.

A family allowance terminates no later than the entry of the order for final distribution of the estate or, if the estate is insolvent, no later than one year after the granting of letters. Prob C §6543(a).

Subject to the above, a family allowance continues until modified or terminated by the court or until such time as the court may provide in its order. Prob C §6543(b).

g. [§302.56] Costs

The costs of family allowance proceedings are paid by the estate as expenses of administration. Prob C §6544. The applicant's attorneys' fees, however, are not recoverable. *Estate of Van Der Oef* (1963) 212 CA2d 155, 158, 27 CR 855; see *In re Filtzer's Estate* (1949) 33 C2d 776, 205 P2d 377 (minor child may recover attorney's fees as part of maintenance and support).

4. [§302.57] Probate Homestead

There is a statutory procedure to set aside a probate homestead for a surviving spouse and minor children. Prob C §§6520 et seq.

The right of a surviving spouse to a probate homestead may be waived in whole or in part. The waiver may be executed before or during the marriage. Prob C §141(a)(6); see Prob C §§140–147.

E. Inventory and Appraisal

1. [§302.58] Requirement and Time

The personal representative must file with the court clerk an inventory of property to be administered in the decedent's estate together with an appraisal of property in the inventory. An inventory and appraisal are combined in a single document. Prob C §8800(a). The inventory and appraisal must be filed within four months after letters are first issued to a general personal representative. The court may allow such further time for filing an inventory and appraisal as is reasonable under the circumstances of the particular case. Prob C §8800(b). An executor need only file an inventory of those assets that have come into his or her possession or becomes known to him or her. An executor should, therefore, file an inventory at the earliest possible moment and, if other property subsequently becomes known to him or her, the executor should file supplemental inventories from time to time. *Layton v State Bar* (1990) 50 C3d 889, 901, 268 CR 845.

The inventory and appraisal must separately list each item and state the fair market value of the item at the time of the decedent's death in monetary terms opposite the item. Prob C §8802.

The required form of inventory and appraisal is Judicial Council Form DE-160.

On the filing of an inventory and appraisal or a supplemental inventory and appraisal, the personal representative mails a copy to each person who has requested special notice. Prob C §8803; see §302.58.

2. [§302.59] Tax Requirements

Concurrent with the filing of the inventory and appraisal, the personal representative must also file a certification that the requirements of Rev & Tax C §480 either (Prob C §8800(d)):

- Are not applicable because the decedent owned no real property in California at the time of death, or
- Have been satisfied by the filing of a change in ownership statement with the county recorder or assessor of each county in California in which the decedent owned property at the time of death.

3. [§302.60] Supplemental Inventory and Appraisal

If the personal representative acquires knowledge of property to be administered in the decedent's estate that is not included in a prior inventory and appraisal, the personal representative must file a supplemental inventory and appraisal of the property in the manner prescribed for an original inventory and appraisal. The supplemental inventory

and appraisal is filed within four months after the personal representative acquires knowledge of the property. The court may allow such further time for filing a supplemental inventory and appraisal as is reasonable under the circumstances of the particular case. Prob C §8801.

4. [§302.61] Failure To File

If the personal representative refuses or negligently fails to file an inventory and appraisal within the time allowed, upon petition of an interested person (Prob C §8804):

- The court may compel the personal representative to file an inventory and appraisal under the procedure prescribed in Prob C §11050.
- The court may remove the personal representative from office.
- The court may impose on the personal representative personal liability for injury to the estate or to an interested person that directly results from the refusal or failure. The liability may include attorney’s fees, in the court’s discretion. Damages awarded are a liability on the bond of the personal representative, if any.

5. [§302.62] What Is Included

The inventory, including partial and supplemental inventories, includes all property to be administered in the decedent’s estate. Prob C §8850(a).

The inventory must particularly specify the following property (Prob C §8850(b)):

- Money owed to the decedent, including debts, bonds, and notes, with the name of each debtor, the date, the sum originally payable, and the endorsements, if any, with their dates. The inventory must also specify security for the payment of money to the decedent, including mortgages and deeds of trust. If security for the payment of money is real property, the inventory must include the recording reference or, if not recorded, a legal description of the real property.
- A statement of the interest of the decedent in a partnership, appraised as a single item.
- All money and other cash items, as defined in Prob C §8901 (see §302.64), of the decedent.

The inventory must show, to the extent ascertainable by the personal representative, the portions of the property that are community, quasi-community, and separate property of the decedent. Prob C §8850(c).

Every inventory and appraisal must contain one of the following statements (Cal Rules of Ct 7.501(a)):

- “Bond is waived”;
- “Bond has been filed in the amount of \$ (*specify amount*) and is insufficient”;
- “Bond has been filed in the amount of \$ (*specify amount*) and is sufficient.”

If the bond is insufficient, the personal representative or the attorney for the representative must immediately make ex parte application as provided in Cal Rules of Ct 7.204 (see §302.26) for an order increasing the amount of the bond. Cal Rules of Ct 7.501(b).

The statement must be signed by the attorney of record for each representative who has an attorney of record and by each representative who does not. Cal Rules of Ct 7.501(c).

6. [§302.63] Citation Procedure

On petition by the personal representative or an interested person, the court may order that a citation be issued to a person to answer interrogatories, or to appear before the court and be examined under oath, or both, concerning any of the following allegations (Prob C §8870(a)):

- The person has wrongfully taken, concealed, or disposed of property in the estate of the decedent.
- The person has knowledge or possession of any of the following:
 - A deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the decedent to property.
 - A claim of the decedent.
 - A lost will of the decedent.

If the person does not reside in the county in which the estate is being administered, the superior court, either of the county in which the person resides or of the county in which the estate is being administered, may issue a citation. Prob C §8870(b).

Disobedience of a citation issued may be punished as a contempt of the court issuing the citation. Prob C §8870(c).

The required Judicial Council form of citation is DE-122.

Notice to the personal representative of a citation proceeding must be given for the period and in the manner provided in Prob C §1220; see §302.44. Other persons requesting notice of the hearing under Prob C §1250 are notified by the person filing the petition as set forth in Prob C §1252. Prob C §8870(d); see §302.44.

Interrogatories may be put to a person cited to answer. The interrogatories and answers must be in writing. The person cited must sign the answer under penalty of perjury. The interrogatories and answers are filed with the court. Prob C §8871.

At an examination, either side may produce and examine witnesses. Prob C §8872(a). If upon the examination it appears that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts to the personal representative. Prob C §8872(b). But if it appears that the allegations of the petition are not true, the person's necessary expenses, including a reasonable attorney's fee, are charged against the petitioner or allowed out of the estate, at the discretion of the court. Prob C §8872(c).

On petition by the personal representative, the court may issue a citation to a person who has possession or control of property in the decedent's estate to appear before the court and make an account under oath of the property and the person's actions with respect to the property. Prob C §8873(a). Disobedience of a citation may be punished as a contempt of the court issuing the citation. Prob C §8873(b).

- ✎ JUDICIAL TIP: Ordinary civil discovery applies to probate proceedings, except to the extent that the Probate Code provides applicable rules. Prob C §1000.

7. [§302.64] Appraisal

The appraisal of property in the inventory is made by the personal representative, probate referee, or independent expert. Prob C §8900.

The personal representative appraises the following property, excluding items whose fair market value is, in the opinion of the personal representative, an amount different from the face value of the property (Prob C §8901):

- Money and other cash items. A “cash item” is a check, draft, money order, or similar instrument issued on or before the date of the decedent’s death that can be immediately converted to cash.
- The following checks issued after the date of the decedent’s death:
 - Checks for wages earned before death.
 - Refund checks, including tax and utility refunds, and Medicare, medical insurance, and other health care reimbursements and payments.
- Accounts (as defined in Prob C §21) in financial institutions.
- Cash deposits and money market mutual funds, as defined in Prob C §9730(b), whether in a financial institution or otherwise, including a brokerage cash account. All other mutual funds, stocks, bonds, and other securities are appraised under Prob C §§8902–8909.
- Proceeds of life and accident insurance policies and retirement plans and annuities payable on death in lump sum amounts.

The personal representative must deliver the inventory to the probate referee designated by the court, together with necessary supporting data to enable the probate referee to make an appraisal of the property in the inventory to be appraised by the probate referee. Prob C §8902(a).

The probate referee appraises all property other than that appraised by the personal representative. Prob C §8902(b).

8. [§302.65] Appointment of Referee

The probate referee, when designated by the court, must be among the persons appointed by the Controller to act as a probate referee for the county. If there is no person available who is able to act or if, pursuant to authority of Prob C §8922 or otherwise, the court does not designate a person appointed for the county, the court may designate a probate referee from another county. Prob C §8920.

The referee is generally appointed at the initial hearing on the petition. See §302.14. There may be local forms for appointment of the referee.

The court may designate a person requested by the personal representative as probate referee, on a showing by the personal representative of good cause for the designation. The following circumstances are included within the meaning of good cause (Prob C §8921):

- The probate referee has recently appraised the same property that will be appraised in the administration proceeding.
- The probate referee will be making related appraisals in another proceeding.
- The probate referee has recently appraised similar property in another proceeding.

The court has authority and discretion not to designate a particular person as probate referee even though appointed by the Controller to act as a probate referee for the county. Prob C §8922.

The court must remove the designated probate referee in any of the following circumstances (Prob C §8924(a)):

- The personal representative shows cause, including incompetence or undue delay in making the appraisal, that warrants removal of the probate referee in the opinion of the court. The showing is made at a hearing on petition of the personal representative. The personal representative mails notice of the hearing on the petition to the probate referee at least 15 days before the date set for the hearing.
- The personal representative has the right to remove the first probate referee who is designated by the court. No cause need be shown for removal. The personal representative may exercise the right at any time before the personal representative delivers the inventory to the probate referee. The personal representative exercises the right by filing an affidavit or declaration under penalty of perjury with the court and mailing a copy to the probate referee. Thereupon, the court must remove the probate referee without any further act or proof.
- Any other cause provided by statute.

Upon removal of the probate referee, the court must designate another probate referee. Prob C §8924(b).

9. [§302.66] Waiver of Appraisal by Referee

The court may, for good cause, waive appraisal by a probate referee. Prob C §8903(a). The personal representative may apply for a waiver together with the petition for appointment of the personal representative or together with another petition, or may apply for a waiver in a separate petition filed in the administration proceedings, but the application may not be made later than the time the personal representative delivers the inventory to the probate referee, if a probate referee has been designated. A copy of the proposed inventory and appraisal and a statement that sets forth the good cause that justifies the waiver must be attached to the petition. Prob C §8903(b).

The hearing on the waiver may not be sooner than 15 days after the petition is filed. Notice of the hearing on the petition, together with a copy of the petition and a copy of the proposed inventory and appraisal, is given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §8903(c)):

- Each person listed in Prob C §1220 (see §302.44).
- Each known heir whose interest in the estate would be affected by the waiver.
- Each known devisee whose interest in the estate would be affected by the waiver.

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the waiver.
- The probate referee, if a probate referee has been designated.

A probate referee to whom notice is given may oppose the waiver. If the opposition fails and the court determines that the opposition was made without substantial justification, the court must award litigation expenses, including reasonable attorney's fees, against the probate referee. If the opposition succeeds, the court may designate a different probate referee to appraise property in the estate. Prob C §8903(d). A probate referee who opposes the petition ordinarily should not appraise the property in the estate. Neither the probate referee who opposed the petition, nor any other probate referee in the same office or with whom the referee has a financial arrangement, should appraise, share in the commission, or in any other manner benefit from the appraisal of property in the estate as a result of the opposition. Cal L Rev Comment to Prob C §8903.

If the petition is granted, the inventory and appraisal attached to the petition are filed under Prob C §8800. Prob C §8903(e).

10. [§302.67] Independent Expert

A unique, artistic, unusual, or special item of tangible personal property that would otherwise be appraised by the probate referee may, at the election of the personal representative, be appraised by an independent expert qualified to appraise the item. Prob C §8904(a). The personal representative makes the election by a notation on the inventory delivered to the probate referee indicating the property to be appraised by an independent expert. The probate referee may, within five days after delivery of the inventory, petition for a court determination whether the property to be appraised by an independent expert is a unique, artistic, unusual, or special item of tangible personal property. If the petition fails and the court determines that the petition was made without substantial justification, the court must award litigation expenses, including reasonable attorney's fees, against the probate referee. Prob C §8904(b).

11. [§302.68] Objection to Appraisal

At any time before the hearing on the petition for final distribution of the estate, the personal representative or an interested person may file with the court a written objection to the appraisal. Prob C §8906(a); see Prob C §48 (definition of interested person). The clerk fixes a time, not less than 15 days after the filing, for a hearing on the objection. Prob C §8906(b).

The person objecting gives notice of the hearing, together with a copy of the objection, as provided in Prob C §1220 (see §302.44). If the appraisal was made by a probate referee, the person objecting shall also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the date set for the hearing. Prob C §8906(c).

The referee must justify the appraisal of an item of property (Prob C §8908(b)), but the person objecting to the appraisal has the burden of proof. Prob C §8906(d).

Upon completion of the hearing, the court may make any order that appears appropriate. If the court determines that the objection was filed without reasonable cause or good faith, the court may order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection. Prob C §8906(e).

Neither the personal representative nor the attorney for the personal representative is entitled to receive compensation for extraordinary services by reason of appraising any property in the estate. Prob C §8907.

12. [§302.69] Return or Report on Appraisal

The probate referee must promptly and with reasonable diligence appraise the property scheduled for appraisal by the probate referee in the inventory that the personal representative delivers to the referee. Prob C §8940(a).

The probate referee also must, not later than 60 days after delivery of the inventory, do one of the following (Prob C §8940(b)):

- Return the completed appraisal to the personal representative.
- Make a report of the status of the appraisal. The report shows the reason why the property has not been appraised and an estimate of the time needed to complete the appraisal. The report is delivered to the personal representative and filed with the court.

The court must, on petition of the personal representative or probate referee, or may, on the court's own motion, hear the report of the status of the appraisal. The court may issue a citation to compel the personal representative or the probate referee to attend the hearing. Prob C §8941(a).

If the probate referee does not make the report of the status of the appraisal within the prescribed time, the court must, on petition of the personal representative or may, on its own motion, cite the probate referee to appear before the court and show the reason why the property has not been appraised. Prob C §8941(b).

Upon the hearing, the court may order any of the following (Prob C §8941(c)):

- That the appraisal be completed within a time that appears reasonable.
- That the probate referee be removed. Upon removal of the probate referee, the court must designate another probate referee in the manner prescribed in Prob C §8920.
- That the commission of the probate referee be reduced by an amount the court deems appropriate, regardless of whether the commission, otherwise allowable under the provisions of Prob C §§8960-8964, would be reasonable compensation for the services rendered.
- That the personal representative deliver to the probate referee all information necessary to allow the probate referee to complete the appraisal. Failure to comply with such an order is grounds for removal of the personal representative.
- Such other orders as may be appropriate.

F. Creditor's Claims

1. [§302.70] Notice

The personal representative must give notice of administration of the estate to the known or reasonably ascertainable creditors of the decedent. The notice is given by mail as provided in Prob C §1215 (first class mail or personal delivery; see §302.12). A personal representative has knowledge of a decedent's creditor if the personal representative is aware that the creditor has demanded payment from the decedent or the estate. Prob C §9050(a). The personal representative is required only to notify creditors who are actually known to the personal representative either because information comes to the attention of the personal representative in the course of administration or because the creditor has demanded payment during administration. Information received by the personal representative may be written or oral; but actual, as opposed to constructive, knowledge is required before a duty to give notice is imposed on the personal representative. The personal representative is not required to notify persons who are potentially creditors because of possible liability of the decedent, but only creditors who have made their claims known. In a case where there is doubt whether notice to a particular person is required under this standard, the personal representative should give notice. Cal L Rev Comment to Prob C §9050.

A personal representative has a duty to make reasonably diligent efforts to identify reasonably ascertainable creditors of the decedent. Prob C §9053(d). This provision implements the principle that the personal representative need not make a special search for creditors, but must only notify those who come to the attention of the personal representative during the course of administration. However, it does not authorize the personal representative to willfully ignore information that would likely impart knowledge of a creditor. Evidentiary inferences and presumptions may be available to prove knowledge of the personal representative in a disputed case. Cal L Rev Comment to Prob C §9053.

The notice must be given within the later of (Prob C §9051):

- Four months after the date letters are first issued.
- Thirty days after the personal representative first has knowledge of the creditor. The personal representative must give notice to the creditor even if the personal representative first has knowledge of the creditor after expiration of the claim filing period. Such a notice does not extend the creditor's time to file a claim. (see §302.75). However, the creditor may petition to file a late claim (see §302.76). Cal L Rev Comment to Prob C §9051.

The required form of notice is Judicial Council Form DE-157.

The publication of notice under Prob C §8120 (see §302.13) and the giving of notice of administration of the estate constitute notice to creditors of the statutory claim requirements. Prob C §9001(a).

Notwithstanding Prob C §9050, the personal representative need not give notice to a creditor even though the personal representative has knowledge of the creditor if any of the following conditions is satisfied (Prob C §9054):

- The creditor has filed a claim.

- The creditor has demanded payment and the personal representative elects to treat the demand as a claim under Prob C §9154 (see §302.73).

2. [§302.71] Liability of Personal Representative

If the personal representative believes that notice to a particular creditor is or may be required and gives notice based on that belief, the personal representative is not liable to any person for giving the notice, whether or not required. Prob C §9053(a). If the personal representative fails to give a required notice, the personal representative is not liable to any person for the failure, unless a creditor establishes all of the following (Prob C §9053(b)):

- The failure was in bad faith.
- The creditor had no actual knowledge of the administration of the estate before expiration of the time for filing a claim, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed.
- Within 16 months after letters were first issued to a general personal representative, the creditor did both of the following:
 - Filed a petition requesting that the court in which the estate was administered make an order determining the liability of the personal representative.
 - At least 30 days before the hearing on the petition, caused notice of the hearing and a copy of the petition to be served on the personal representative in the manner provided in CCP §413.10.

Nothing in Prob C §9053 affects the liability of the estate, if any, for the claim of a creditor, and the personal representative is not liable for the claim to the extent it is paid out of the estate or could be paid out of the estate. Prob C §9053(c).

3. [§302.72] Filing Claim

A claim may be filed by the creditor or a person acting on behalf of the creditor. Prob C §9150(a).

“Claim” means a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated (Prob C §9000(a)):

- Liability of the decedent, whether arising in contract, tort, or otherwise.
- Liability for taxes incurred before the decedent's death, whether assessed before or after the decedent's death, other than property taxes and assessments secured by real property liens.
- Liability of the estate for funeral expenses of the decedent. The reasonable cost of interment and an interment plot of sufficient size to constitute a family plot and memorial including reasonable sums for either, or both, general and special endowment care of the plot proportionate to the value of the estate and in keeping with the standard of living adopted by the decedent before death, together with

interest thereon from 60 days after the date of death, are considered part of the funeral expenses. Reasonable costs of funeral services are also part of the funeral expenses. If a claim for mortuary and funeral services, an interment plot, or memorial is rejected, the burden of proving that the cost of the funeral service, interment plot, or memorial is disproportionate to the value of the estate and the standard of living adopted by the decedent while living is upon the executor or administrator rejecting the claim. Health & S C §7101.

“Claim” does not include a dispute regarding title to specific property alleged to be included in the decedent’s estate. Prob C §9000(b). A claim need not be filed in the case of foreclosure of a lien on property in the decedent’s estate. Cal L Rev Comment to Prob C §9000; Prob C §9391; see §302.84.

A claim is filed with the court and a copy must be served on the personal representative, or on a person who is later appointed and qualified as personal representative. Prob C §9150(b). Service of the claim on the personal representative must be made within the later of 30 days of the filing of the claim or four months after letters are issued to a personal representative with general powers. Service is not required after the claim has been allowed or rejected. Prob C §9150(c). If the creditor does not file the claim with the court and serve the claim on the personal representative, the claim is invalid. Prob C §9150(d). The required form of creditor’s claim is in Judicial Council Form DE-172.

The personal representative may require satisfactory vouchers or proof to be produced to support a claim. An original voucher may be withdrawn after a copy is provided. If a copy is provided, the copy is attached to the claim. Prob C §9151(b).

If a claim is based on a written instrument, either the original or a copy of the original with all endorsements is attached to the claim. If a copy is attached, the original instrument must be exhibited to the personal representative or court or judge on demand unless it is lost or destroyed, in which case the fact that it is lost or destroyed must be stated in the claim. Prob C §9152(a).

If the claim or a part of the claim is secured by a mortgage, deed of trust, or other lien that is recorded in the office of the recorder of the county in which the property subject to the lien is located, it is sufficient to describe the mortgage, deed of trust, or lien and the recording reference for the instrument that created the mortgage, deed of trust, or other lien. Prob C §9152(b).

4. [§302.73] Election To Treat Written Demand as Claim

If a creditor makes a written demand for payment within four months after the date letters are first issued to a general personal representative, the personal representative may waive formal defects and elect to treat the demand as a claim that is filed and established by paying the amount demanded before the expiration of 30 days after the four-month period if all of the following conditions are satisfied (Prob C §9154(a)):

- The debt was justly due.
- The debt was paid in good faith.
- The amount paid was the true amount of the indebtedness over and above all payments and offsets.

- The estate is solvent.

5. [§302.74] Waiver and Estoppel

Nothing in the statutory claim provisions limit application of (1) the doctrines of waiver, estoppel, laches, or detrimental reliance or (2) any other equitable principle. Prob C §9154(b). This provision expressly recognizes equitable principles that might permit payment of an informal claim notwithstanding a failure to satisfy all the claim filing requirements. For example, in *Estate of Sturm* (1988) 201 CA3d 14, 246 CR 852, recognition and partial payment of the debt by the personal representative within the four-month and thirty-day limitation was found to serve as an equitable basis for allowing completion of payments beyond that period. Cal L Rev Comment to Prob C §9154.

6. [§302.75] Time for Filing Claim

A creditor must file a claim before expiration of the later of the following times (Prob C §9100(a)):

- Four months after the date that letters are first issued to a general personal representative.
- Sixty days after the date that notice of administration is given to the creditor. But this does not extend the time provided in CCP §366.2 (extension of limitations period based on death of debtor). The time begins to run when the corporate mail department receives the notice, not when it is forwarded to the legal department. *Gertner v Superior Court* (1993) 20 CA4th 927, 931–932, 25 CR2d 47.

A claim that is not filed as provided above is barred. Prob C §9002(b); but see Prob C §9154(b) and discussion above at §302.74.

If a creditor has actual notice of the death of the debtor and notice of the administration of the estate, it is not excused from timely filing a claim by the estate's failure to give formal notice of administration to the creditor. *Venturi v Taylor* (1995) 35 CA4th 16, 21–23, 41 CR2d 272; see *Clark v Kerby* (1992) 4 CA4th 1505, 1514, 6 CR2d 440 (notice of administration, not just death, is required).

Nothing in Prob C §9100 may be interpreted to extend or toll any other statute of limitations or to revive a claim that is barred by any statute of limitations. The reference to a “statute of limitations” includes CCP §366.2 (see §302.77). Prob C §9100(b).

A claim that is filed before expiration of the time for filing the claim is timely even if acted on by the personal representative or by the court after expiration of the time. Prob C §9102.

7. [§302.76] Filing Late Claim

Upon petition by a creditor or the personal representative, the court may allow a claim to be filed after expiration of the time for filing a claim if either of the following conditions is satisfied (Prob C §9103(a)):

- The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate; or

- The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days before the time for filing a claim as provided in Prob C §9100, and the petition is filed within 60 days after the creditor has actual knowledge of both of the following (Prob C §9103(a)):
 - The existence of the facts reasonably giving rise to the existence of the claim.
 - The administration of the estate.

The court, however, may not allow a claim to be filed after it makes an order for final distribution of the estate. Prob C §9103(b).

Although the code section described above authorizes a court to approve the filing of late claims under certain circumstances, it does not authorize the allowance or approval of a claim barred by, or extend the time provided in, CCP §366.2 (see §302.75). Prob C §9103(f).

The court may condition the claim on terms that are just and equitable and may require the appointment or reappointment of a personal representative if necessary. The court may deny the creditor's petition if a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among creditors. Prob C §9103(c).

Notice of hearing on the petition is given as provided in Prob C §1220 (see §302.44). Prob C §9103(e).

A creditor who fails to avail itself of the late claims procedure cannot claim that its constitutional rights to notice were violated. *Interinsurance Exchange v Narula* (1995) 33 CA4th 1140, 1147, 39 CR2d 752.

8. [§302.77] Amended Claim

If a claim is timely filed, the creditor may later amend or revise the claim. The amendment or revision is filed in the same manner as the claim. Prob C §9104(a). But an amendment or revision may not be made to increase the amount of the claim after the time for filing a claim has expired. An amendment or revision to specify the amount of a claim that, at the time of filing, was not due, was contingent, or was not yet ascertainable, is not an increase in the amount of the claim. Prob C §9104(b). If no claim was filed, an amended claim may not be filed after the time limit for claims. A notice that a claim might be filed was not sufficient to constitute a timely claim. *Nathanson v Superior Court* (1974) 12 C3d 355, 366-367, 115 CR 783.

An amendment or revision may not be made for any purpose after the earlier of the following times (Prob C §9104(c)):

- The time the court makes an order for final distribution of the estate.
- One year after letters are first issued to a general personal representative.

9. [§302.78] Claims by Public Entities

In general, a claim by a public entity must be filed within the same time as other claims. A claim not so filed is barred, including any lien imposed for the claim. Prob C §9200(a).

However, if a claim of a public entity arises under a law, act, or code listed in Prob C §9201(b) (Prob C §9201(a)(1), (2)):

- The public entity may provide a form to be used for the written notice or request to the required public entity. When appropriate, the form may require the decedent's social security number, if known.
- The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code.

This provision does not govern obligations owed to the United States that are governed by federal law. Cal L Rev Comment to Prob C §9200.

10. [§302.79] Allowance and Rejection of Claims

When a claim is filed, the personal representative allows or rejects the claim in whole or in part. Prob C §9250(a). The allowance or rejection must be in writing. The personal representative files the allowance or rejection with the court clerk and gives notice to the creditor as provided in Prob C §1200, together with a copy of the allowance or rejection. Prob C §9250(b); see Cal Rules of Ct 7.401. Service on the creditor is sufficient; there is no requirement to serve the creditor's attorney. *Merrill v Finberg* (1992) 4 CA4th 1443, 1447, 6 CR2d 434.

The required Judicial Council form is DE-174.

This provision does not apply to a demand that the personal representative elects to treat as a claim under Prob C §9154 (see §302.70). Prob C §9250(e).

If the personal representative is not authorized to act under the IAEA (see §302.28) (Prob C §9251):

- Immediately on the filing of the allowance of a claim, the clerk must present the claim and allowance to the court or judge for approval or rejection.
- On presentation of a claim and allowance, the court or judge may, in its discretion, examine the creditor and others on oath and receive any evidence relevant to the validity of the claim. The court or judge endorses on the claim whether the claim is approved or rejected and the date.

If the personal representative is authorized to act under the IAEA (see §302.28), he or she may allow, pay, reject, contest, compromise, or settle the claim without any notice requirement. Prob C §10552. Except as to claims of the personal representative or the attorney, if the personal representative has authority to act under the IAEA, the court must not act on the personal representative's allowance or rejection of a creditor's claim unless good cause is shown. Cal Rules of Ct 7.402.

If the personal representative or the attorney for the personal representative is a creditor of the decedent, the clerk must present the claim to the court or judge for approval or rejection. The court or judge may in its discretion require the creditor to file a petition and give notice of hearing. Prob C §9252(a). If the court or judge approves the claim, the claim is established and is included with other established claims to be paid in the course of administration. Prob C §9252(b). If the court or judge rejects the claim, the

personal representative or attorney may bring an action against the estate. Summons is served on the judge, who appoints an attorney at the expense of the estate to defend the action. Prob C §9252(c).

A claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Prob C §9253.

The validity of an allowed or approved claim may be contested by any interested person at any time before settlement of the report or account of the personal representative in which it is first reported as an allowed or approved claim. The burden of proof is on the contestant, except where the personal representative has acted under the IAEA (see §302.28), in which case the burden of proof is on the personal representative. Prob C §9254(a). This provision does not apply to a claim established by a judgment. Prob C §9254(b).

The personal representative may allow a claim, or the court or judge may approve a claim, in part. The allowance or approval shall state the amount for which the claim is allowed or approved. Prob C §9255(a).

A creditor who refuses to accept the amount allowed or approved in satisfaction of the claim may bring a civil action on the claim in the manner provided in Prob C §§9350 et seq. The creditor may not recover costs in the action unless the creditor recovers an amount greater than that allowed or approved. Prob C §9255(b).

If the personal representative or the court or judge has refused or neglected to act on the claim within 30 days after a claim is filed, the refusal or neglect may, at the option of the creditor, be deemed equivalent to giving a notice of rejection on the 30th day. Prob C §9256.

11. [§302.80] Judgments

After the death of the decedent, all money judgments against the decedent or against the personal representative on a claim against the decedent or estate are payable in the course of administration and are not enforceable against property in the decedent's estate under the Enforcement of Judgments Law. CCP §§680.010 et seq; Prob C §9300(a).

A judgment is filed in the same manner as other claims. Prob C §9300(b). Failure to file a claim based on a judgment precludes enforcement of the judgment against estate property, whether distributed or not. *Embree v Embree* (2003) 125 CA4th 487, 494, 22 CR3d 782.

When a money judgment against a personal representative in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment must provide that it is payable out of property in the decedent's estate in the course of administration. An abstract of the judgment is filed in the administration proceedings. Prob C §9301; see *Mason v Department of Real Estate* (2002) 102 CA4th 1349, 1354, 126 CR2d 278.

Notwithstanding the death of the decedent, a judgment for possession of property or a judgment for sale of property may be enforced under the Enforcement of Judgments Law, CCP §§680.010 et seq. This provision limits enforcement to the property described in the judgment for possession or sale. Prob C §9302(a).

After the death of the decedent, a demand for money that is not satisfied from the property described in a judgment for sale of property is filed as a claim in the same

manner as other claims and is payable in the course of administration. Prob C §9302(b). A judgment for possession of property may include damages and costs that ordinarily would be recovered by levy on other property of the judgment debtor. There may also be accrued costs, interest, and the levying officer's costs in enforcing a judgment for possession, and these also would ordinarily be recovered by the judgment creditor by levy on other property of the judgment debtor. This provision makes clear that, after the death of the judgment debtor, these claims for money cannot be enforced by levy against other property of the decedent; instead, amounts due under a judgment for possession are enforced in the same manner as a money judgment and thus are governed by the general rule applicable to money judgments under Prob C §9300. Cal L Rev Comment to Prob C §9302.

If property of the decedent is subject to an execution lien at the time of the decedent's death, enforcement against the property may proceed under the Enforcement of Judgments Law (CCP §§680.010 et seq) to satisfy the judgment. The levying officer must account to the personal representative for any surplus. If the judgment is not satisfied, the balance of the judgment remaining unsatisfied is payable in the course of administration. Prob C §9303.

An attachment lien may be converted into a judgment lien on property in the estate subject to the attachment lien, with the same priority as the attachment lien, in either of the following cases (Prob C §9304(a)):

- When the judgment debtor dies after entry of judgment in an action in which the property was attached.
- When a judgment is entered after the death of the defendant in an action in which the property was attached.

To convert the attachment lien into a judgment lien, the levying officer must, after entry of judgment in the action in which the property was attached and before the expiration of the attachment lien, do one of the following (Prob C §9304(b)):

- Serve an abstract of the judgment, and a notice that the attachment lien has become a judgment lien, on the person holding property subject to the attachment lien.
- Record or file, in any office where the writ of attachment and notice of attachment are recorded or filed, an abstract of the judgment and a notice that the attachment lien has become a judgment lien. If the attached property is real property, the plaintiff or the plaintiff's attorney may record the required abstract and notice with the same effect as if recorded by the levying officer.

After the death of the decedent, any members of the decedent's family who were supported in whole or in part by the decedent may claim an exemption provided in CCP §487.020 for property levied on under the writ of attachment if the right to the exemption exists at the time the exemption is claimed. The personal representative may claim the exemption on behalf of members of the decedent's family. The claim of exemption may be made at any time before the time the abstract and notice are served, recorded, or filed with respect to the property claimed to be exempt. The claim of exemption is made in the same manner as an exemption is claimed under CCP §462.100. Prob C §9304(c). The primary purpose of Prob C §9304(c) is to preserve the effect, after the death of the

decedent, of the exemption provided CCP §487.020(b) (property “necessary for the support of [the defendant’s family] supported in whole or in part by the defendant”). However, Prob C §9304(c) also permits the claim of any of the other exemptions provided by CCP §487.020. Cal L Rev Comment to Prob C §9304.

12. [§302.81] Actions Not Pending at Time of Death

The provisions below apply to any claim other than a claim on an action or proceeding pending against the decedent at the time of death. Prob C §9350.

An action may not be commenced against a decedent’s personal representative on a cause of action against the decedent unless a claim is first filed and the claim is rejected in whole or in part. Prob C §9351; but see *Hemphill v Estate of Ryskamp* (2008) 619 F Supp 2d 954, 982–983 (ERISA claim requirements preempt Prob C §9351 requirements).

The filing of a claim or a petition under Prob C §9103 to file a claim tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection. Prob C §9352(a).

The allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved. Prob C §9352(b).

Regardless of whether the statute of limitations otherwise applicable to a claim will expire before or after the following times, a claim rejected in whole or in part is barred as to the part rejected unless, within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration (Prob C §9353(a)):

- If the claim is due at the time the notice of rejection is given, three months after the notice is given.
- If the claim is not due at the time the notice of rejection is given, three months after the claim becomes due.

The time during which there is a vacancy in the office of the personal representative is excluded. Prob C §9353(b).

In addition to any other county in which an action may be commenced, an action on the claim may be commenced in the county in which the proceeding for administration of the decedent’s estate is pending. Prob C §9354(a).

The plaintiff must file a notice of the pendency of the action with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in Prob C §1215. Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice. Any property distributed under court order, or any payment properly made, before the notice is filed and given is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment. Prob C §9354(b).

The prevailing party in the action is awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party is awarded reasonable litigation expenses, including attorney’s fees. Prob C §9354(c).

13. [§302.82] Actions Pending at Time of Death

An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless all of the following conditions are satisfied (Prob C §9370(a)):

- A claim is first filed.
- The claim is rejected.
- Within three months after the notice of rejection is given, the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding. This paragraph applies only if the notice of rejection contains a statement that the plaintiff has three months within which to apply for an order for substitution.

No recovery may be allowed in the action against property in the decedent's estate unless proof is made of compliance with the above. Prob C §9370(b).

14. [§302.83] Insured Claim

An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued under Prob C §550, and a judgment in the action may be enforced against the insurer, without first filing a claim (Prob C §9390(a)), or joining the personal representative (Prob C §550).

Notwithstanding CCP §366.2 (see §302.75), if the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action may be commenced within one year after the expiration of the limitations period otherwise applicable. Prob C §551.

Unless a claim against the estate is first made, an action to establish the decedent's liability for damages outside the limits or coverage of the insurance may not be commenced or continued under Prob C §550. Prob C §9390(b); see Prob C §554.

If the insurer seeks reimbursement under the insurance contract for any liability of the decedent, including, but not limited to, deductible amounts in the insurance coverage and costs and attorney's fees for which the decedent is liable under the contract, an insurer defending an action under Prob C §550 must file a claim. Failure to file a claim is a waiver of reimbursement under the insurance contract for any liability of the decedent. Prob C §9390(c).

15. [§302.84] Claim by Lienholder

Except as provided in Prob C §10361 (sale of encumbered property), the holder of a mortgage or other lien on property in the decedent's estate, including, but not limited to, a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. Code of Civil Procedure §366.2 (one year statute of limitations) does not apply to this action. The personal representative has the authority to seek to enjoin any action of the lienholder to enforce a lien against property that is subject to the lien. Prob C §9391.

16. [§302.85] Liability of Distributee

A person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied (Prob C §9392(a)):

- The identity of the creditor was known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to the personal representative, and the claim of the creditor was not merely conjectural.
- Notice of administration of the estate was not given to the creditor under Prob C §9050 and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.
- The statute of limitations applicable to the claim under CCP §353 has not expired at the time of commencement of an action.

Personal liability is applicable only to the extent that the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to a pro rata portion of the claim of the creditor, based on the proportion that the value of the property distributed to the person out of the estate bears to the total value of all property distributed to all persons out of the estate. Personal liability for all claims of all creditors may not exceed the value of the property distributed to the person out of the estate. The value of property is the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Prob C §9392(b).

This provision implements the rule of *Tulsa Professional Collection Servs., Inc. v Pope* (1988) 485 US 478, 108 S Ct 1340, 99 L Ed 2d 565, that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is not given actual notice of administration may not be cut off by a short claim filing requirement. Probate Code §9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors. Cal L Rev Comment to Prob C §9392.

This does not affect the rights of a purchaser or encumbrance of property in good faith and for value from a person who is personally liable thereunder. Prob C §9392(c).

17. [§302.86] Statute of Limitations

If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply. CCP §366.2(a). This limitations period applies to a cross-complaint for equitable indemnity against the estate when the cross-complaint is filed more than one year after the date of death; Code of Civil Procedure §336.2 refers to all actions “whether accrued or not accrued,” which includes indemnity actions that did not accrue until after the decedent’s death. *Bradley v Breen* (1999) 73 CA4th 798, 803–804, 86 CR2d 726.

The limitations period for commencement of an action is not tolled or extended for any reason except as provided in any of the following, where applicable (CCP §366.2(b)):

- CCP §§12, 12a, 12b (extension for holidays, etc.).
- Prob C §§9000 et seq (creditor claims in administration of estates of decedents); see *Anderson v Anderson* (1995) 41 CA4th 135, 138, 48 CR2d 642 (creditor who filed claim had 3 months from denial of claim to file action under Prob C §9353).
- Prob C §§19000 et seq (payment of claims, debts, and expenses from revocable trust of deceased settlor).
- Prob C §§21300 et seq (no contest clauses).

Equitable estoppel is applicable to bar assertion of the statute of limitations as a defense. *Battuello v Battuello* (1998) 64 CA4th 842, 847, 75 CR2d 548.

If a person has a claim to distribution from an estate or trust or under another instrument that arises from a promise or agreement with a decedent, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply. CCP §366.3(a).

The limitations period provided in CCP §366.3 for commencement of an action is not tolled or extended for any reason except as provided in Prob C §§12, 12a, and 12b (extension for holidays, etc.), and Prob C §§21300 et seq (no contest clauses). CCP §366.3(b).

G. Estate Management—General Principles

1. [§302.87] General Duties and Liabilities

The personal representative has the management and control of the estate and, in managing and controlling the estate, must use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate. Prob C §9600(a). In determining what constitutes ordinary care and diligence, a professional personal representative is held to a higher standard of care based on its presumed expertise than is a lay personal representative. See *Estate of Beach* (1975) 15 C3d 623, 635, 125 CR 570. Cal L Rev Comment to Prob C §9600.

The personal representative (Prob C §9600(b)):

- Must exercise a power to the extent that ordinary care and diligence require that the power be exercised.
- Must not exercise a power to the extent that ordinary care and diligence require that the power not be exercised.

Probate Code §9600(b) makes clear that ordinary care and diligence may require that the personal representative exercise a power. For example, the personal representative has the duty to take all steps reasonably necessary for the protection and preservation of the estate property, and this duty requires that the personal representative obtain and maintain insurance on the estate property to the extent reasonably necessary. See Prob C §9656. At the same time, subdivision (b) also makes clear that the extent to

which a power should be exercised is limited to what is required by the exercise of ordinary care and diligence under all the circumstances. Thus, for example, the personal representative is not authorized to obtain or maintain more insurance on the estate property than is reasonably necessary. In determining when a power is required to be exercised and when it may not be exercised, the personal representative has some discretion. For example, the personal representative has discretion to determine the amount of insurance, and so long as the amount of insurance is not unreasonably high or low under the circumstances, the personal representative has complied with the duty to use ordinary care and diligence. Cal L Rev Comment to Prob C §9600.

If a personal representative breaches a fiduciary duty, the personal representative is chargeable with any of the following that is appropriate under the circumstances (Prob C §9601(a)):

- Any loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest.
- Any profit made by the personal representative through the breach of duty, with interest.
- Any profit that would have accrued to the decedent's estate if the loss of profit is the result of the breach of duty.

If the personal representative is liable for interest under Prob C §9601, the personal representative is liable for the greater of the following amounts (Prob C §9602(a)):

- The amount of interest that accrues at the legal rate on judgments.
- The amount of interest actually received.

If the personal representative has acted reasonably and in good faith under the circumstances as known to the personal representative, the court, in its discretion, may excuse the personal representative in whole or in part from the above if it would be equitable to do so. Prob C §§9601(b), 9602(b).

These provisions for liability of a personal representative for breach of a fiduciary duty do not prevent resort to any other remedy available against the personal representative under the statutory or common law. Prob C §9603.

No personal representative is chargeable upon a special promise to answer in damages for a liability of the decedent or to pay a debt of the decedent out of the personal representative's own estate unless the agreement for that purpose, or some memorandum or note thereof, is in writing and is signed by one of the following (Prob C §9604):

- The personal representative.
- Some other person specifically authorized by the personal representative in writing to sign the agreement or the memorandum or note.

Appointment of a person as personal representative does not discharge any claim that the decedent has against the person. Prob C §9605.

Unless otherwise provided in the instrument or by statute, a personal representative is not personally liable on an instrument, including but not limited to a note, mortgage, deed of trust, or other contract, that is properly entered into in the personal representative's fiduciary capacity in the course of administration of the estate unless the

personal representative fails to reveal the personal representative's representative capacity or identify the estate in the instrument. Prob C §9606.

2. [§302.88] Authorization From Court

Unless the Probate Code specifically provides a proceeding to obtain court authorization or requires court authorization, the powers and duties may be exercised by the personal representative without court authorization, instruction, approval, or confirmation. But, nothing precludes the personal representative from seeking court authorization, instructions, approval, or confirmation. Prob C §9610. In a situation when the personal representative is authorized to act without court authorization and the personal representative decides to take the action without obtaining court authorization, the personal representative must use ordinary care and diligence in taking the action. Cal L Rev Comment to Prob C §9610.

If no other procedure is provided by statute, upon petition of the personal representative, the court may authorize and instruct the personal representative, or approve and confirm the acts of the personal representative, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith. Probate Code §9613 (petition by interested person to direct personal representative) does not preclude such a petition for instructions. Prob C §9611(a). Notice of the hearing on the petition must be given as provided in Prob C §1220. Prob C §9611(b); see §302.44. The petition for instructions generally may be used only when no other procedure is provided by statute. For example, a petition for instructions may be used to obtain court authorization to incorporate the decedent's unincorporated business, because there is no specific provision governing that matter. If another procedure is provided by statute but the personal representative is uncertain whether the statute providing the other procedure is applicable to the particular case, the personal representative may petition in the alternative, giving notice that is sufficient to satisfy the requirements of both Prob C §9611 and the other possibly applicable statute. Cal L Rev Comment to Prob C §9611.

On petition of any interested person, and upon a showing that if the petition is not granted the estate will suffer great or irreparable injury, the court may direct the personal representative to act or not to act concerning the estate. The order may include terms and conditions the court determines are appropriate under the circumstances. Prob C §9613(a); see Prob C §48 (definition of interested person). The showing of irreparable injury is analogous to the irreparable injury that must be shown for injunctive relief. Cal L Rev Comment to Prob C §9613. Notice of the hearing on the petition must be given as provided in Prob C §1220 (see §302.44). Prob C §9613(b).

When the order becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. Prob C §7250(a). This provision does not apply if the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact. Misrepresentation includes, but is not limited to, the omission of a material fact. Prob C §7250(c).

3. [§302.89] Suspension of Powers

On petition of an interested person, the court may suspend the powers of the personal representative in whole or in part, for a time, as to specific property or circumstances or as to specific duties of the office, or may make any other order to secure proper performance of the duties of the personal representative, if it appears to the court that the personal representative may otherwise take some action that would unreasonably jeopardize the interest of the petitioner. Persons with whom the personal representative may transact business may be made parties to the action. Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44). Prob C §9614(a); see Prob C §48 (definition of interested person).

The matter is set for hearing within 10 days unless the parties agree otherwise. Notice as the court directs is given to the personal representative and attorney of record, if any, and to any other parties named in the petition. Prob C §9614(b). The court may, in its discretion, if it determines that the petition was brought unreasonably and for the purpose of hindering the personal representative in the performance of the duties of the office, assess attorney's fees against the petitioner and make the assessment a charge against the interest of the petitioner. Prob C §9614(c).

4. [§302.90] Summary Determination of Disputes

If there is a dispute relating to the estate between the personal representative and a third person, the personal representative may do either of the following (Prob C §9620):

- Enter into an agreement in writing with the third person to refer the dispute to a temporary judge designated in the agreement. The agreement must be filed with the clerk, who must, with the approval of the court, enter an order referring the matter to the person designated to be the temporary judge. The temporary judge must promptly hear and determine the matter in controversy by summary procedure, without pleadings or discovery. The decision of the temporary judge is subject to CCP §632 (findings and statement of decision requirement). Judgment is entered on the decision and is as valid and effective as if rendered by a judge of the court in an action against the personal representative or the third person commenced by ordinary process.
- Enter into an agreement in writing with the third person that a judge, pursuant to the agreement and with the written consent of the judge, both filed with the clerk within the time specified in Prob C §9353 (see §302.81) for bringing an independent suit on the matter in dispute, may hear and determine the dispute using the same procedure as for a designated temporary judge described above.

Another alternative if there is a dispute relating to the estate between the personal representative and a third person is for the personal representative to enter into an agreement in writing with the third person to submit the dispute to arbitration under CCP §1280. But the agreement must first be approved by the court, and a copy of the approved agreement must be filed with the court. Notice of the hearing on the petition for approval of the agreement is given as provided in Prob C §1220 (see §302.44). The order approving the agreement may be made ex parte. Prob C §9621.

5. [§302.91] Dealing With Estate Property

Except as provided by statute (Prob C §9650(a)):

- The personal representative has the right to, and must take possession or control of, all the property of the decedent to be administered in the decedent's estate and collect all debts due to the decedent or the estate. The personal representative is not accountable for any debts that remain uncollected without his or her fault.
- The personal representative is entitled to receive the rents, issues, and profits from the real and personal property in the estate until the estate is distributed.

The personal representative must pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in his or her possession. Prob C §9650(b).

Real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative is necessary for purposes of administration. The person holding the property must surrender it to the personal representative on request by the personal representative. Prob C §9650(c).

A personal representative who, in good faith, takes real or personal property into possession and reasonably believes that the property is part of the estate of the decedent, is not (Prob C §9651(a)):

- Criminally liable for so doing.
- Civilly liable to any person for so doing.

The personal representative must make reasonable efforts to determine the true nature of, and title to, the property so taken into possession. Prob C §9651(b).

During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the property is later determined not to be part of the estate of the decedent, the personal representative delivers the property, or causes it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received by the personal representative, less any expenses incurred in protecting and maintaining the property and in collecting rents, issues, and profits. The personal representative may request court approval before delivering the property. Prob C §9651(c).

The personal representative must keep all cash in his or her possession invested in interest-bearing accounts or other investments authorized by law. Prob C §9652(a). This requirement, however, does not apply to cash that is reasonably necessary for the orderly administration of the estate. Prob C §9652(b).

The personal representative may insure the property of the estate against damage or loss and may insure himself or herself against liability to third persons. Prob C §9656.

H. Estate Management—Specific Transactions

1. [§302.92] Deposit of Money

The personal representative may deposit money of the estate in an insured account in a financial institution in California. Prob C §9700. The personal representative also

may deposit personal property of the estate with a trust company for safekeeping. Prob C §9701. Unless otherwise provided by court order, the money or personal property may be withdrawn without order of the court. Prob C §§9700, 9701.

Upon application of the personal representative, the court may, with or without notice, order that money or other personal property be deposited and be subject to withdrawal only upon authorization of the court. Prob C §9703(a). Such deposits reduce the required amount of the bond. Prob C §8483(b); see §302.26.

2. [§302.93] Continuation of Business

If it is to the advantage of the estate and in the best interest of the interested persons, the personal representative, with or without court authorization, may continue the operation of the decedent's business; but the personal representative may not continue the operation of the decedent's business for a period of more than six months from the date letters are first issued without a court order authorizing the personal representative to continue the operation of the business. Prob C §9760(b). "Decedent's business" means an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death, but does not include a business operated by a partnership in which the decedent was a partner. Prob C §9760(a).

Although Prob C §9760 authorizes a personal representative to operate the decedent's nonpartnership business without prior court authorization for the six-month period, it is generally advisable for the personal representative to obtain an order authorizing continued operation of the business. If the personal representative operates the decedent's business without prior authorization of the court, the court may ratify the acts and expenditures of the personal representative after the fact. See *In re Estate of Maddalena* (1940) 42 CA2d 12, 19, 108 P2d 17. Under Prob C §9760, the personal representative may obtain ratification only upon a showing that it was to the advantage of the estate and in the best interest of interested persons to continue the operation of the decedent's business. Cal L Rev Comment to Prob C §9760.

The personal representative or any interested person may file a petition requesting an order (1) authorizing the personal representative to continue the operation of the decedent's business or (2) directing the personal representative to discontinue the operation of the decedent's business. The petition must show the advantage to the estate and the benefit to the interested persons of the order requested. Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44. Prob C §9760(c)).

If a petition is filed, the court may make an order that either (Prob C §9760(d)):

- Authorizes the personal representative to continue the operation of the decedent's business to such an extent and subject to such restrictions as the court determines to be to the advantage of the estate and in the best interest of the interested persons.
- Directs the personal representative to discontinue the operation of the decedent's business within the time specified in, and in accordance with the provisions of, the order.

3. [§302.94] Continuation of Partnership

After authorization by order of court upon a showing that it would be to the advantage of the estate and in the best interest of the interested persons, the personal representative may continue as a general or a limited partner in any partnership in which the decedent was a general partner at the time of death. In its order, the court may specify any terms and conditions of the personal representative's participation as a partner that the court determines are to the advantage of the estate and in the best interest of the interested persons, but any terms and conditions that are inconsistent with the terms of any written partnership agreement are subject to the written consent of all of the surviving partners. Prob C §9762(a).

To obtain an order, the personal representative or any interested person files a petition showing that the order requested would be to the advantage of the estate and in the best interest of the interested persons. Notice of the hearing on the petition is given as provided in Prob C §1220. In addition, unless the court otherwise orders, the petitioner, not less than 15 days before the hearing, must mail the notice of hearing and a copy of the petition to each of the surviving general partners at his or her last known address. Prob C §9762(d).

If a partnership existed between the decedent and another person at the time of the decedent's death, on application of the personal representative, the court may order any surviving partner to render an account under Corp C §15510, §15634, or §16807. An order may be enforced by the court's power to punish for contempt. Prob C §9761.

4. [§302.95] Law Practice

The personal representative of the estate of a deceased attorney who was engaged in a practice of law at the time of his or her death or other person interested in the estate may bring a petition for appointment of an active member of the State Bar of California to take control of the files and assets of the practice of the deceased member. Prob C §9764(a). The rights and duties of the practice administrator are governed by Prob C §9764.

5. [§302.96] Disposal of Personal Property

Unless the property is specifically devised, the personal representative may dispose of or abandon tangible personal property when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value. Prob C §9780.

Unless otherwise provided in the will, the personal representative may exercise the power to dispose of property without court authorization or approval. Prob C §9781. Notice must be given to devisees, heirs, and persons who requested special notice. Prob C §9782.

6. [§302.97] Purchase by Personal Representative or Attorney

Except as provided below, neither the personal representative nor the personal representative's attorney may do any of the following (Prob C §9880):

- Purchase any property of the estate or any claim against the estate, directly or indirectly.

- Be interested in any such purchase.

The term “personal representative’s attorney” is to be given a broad meaning and includes the associates, partners, and attorneys of counsel with the law firm of the attorney retained by the personal representative and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney retained by the personal representative. Cal L Rev Comment to Prob C §9880.

Upon a petition filed under Prob C §9883, the court may make an order authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if all of the following requirements are satisfied (Prob C §9881):

- Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.
- The written consents are filed with the court.
- The purchase is shown to be to the advantage of the estate.

Upon a petition filed under Prob C §9883, the court may make an order authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative’s attorney to purchase the property. Prob C §9882.

The personal representative may file a petition requesting that the court make such an order. Prob C §9883(a). If court confirmation of the sale is required, the court may make its order under Prob C §9881 or §9882 at the time of the confirmation. Prob C §9883(b).

Notice of the hearing on the petition is given as provided in Prob C §1220 to all of the following persons (Prob C §9883(c)):

- Each person listed in Prob C §1220 (see §302.44).
- Each known heir whose interest in the estate would be affected by the proposed purchase.
- Each known devisee whose interest in the estate would be affected by the proposed purchase.

If the court is satisfied that the purchase should be authorized, the court makes an order authorizing the purchase upon the terms and conditions specified in the order, and the personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise provided in the will or in the order of the court, the sale of the property is made in the same manner as the sale of other estate property of the same nature. Prob C §9883(d).

- **JUDICIAL TIP:** The California Rules of Professional Conduct provide that a member of the state bar shall not directly or indirectly purchase property at a probate sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member’s law firm is acting as a lawyer for a party or as executor. Cal Rules of Prof Cond 4-300.

7. [§302.98] Borrowing Money

The personal representative must obtain a court order to borrow money. The form of borrowing may be on a note, either unsecured or to be secured by a security interest or other lien on the personal property of the estate, or any part thereof, or to be secured by a mortgage or deed of trust on the real property of the estate, or any part thereof. The personal representative may also give a security interest or other lien on the personal property of the estate, or any part thereof, or a mortgage or deed of trust on the real property of the estate, or any part thereof. The borrowing must be to do any one or more of the following (Prob C §9800(a)):

- Pay the debts of the decedent or the estate, devises, expenses of administration, and charges against the estate.
- Pay, reduce, extend, or renew a security interest or lien or mortgage or deed of trust already existing on property of the estate.
- Improve, use, operate, or preserve property in the estate.

If a surviving spouse has elected to have his or her share of community property administered in the decedent's estate, then the written consent of the surviving spouse is required for any borrowing on community property. Prob C §9800(c). Further provisions regarding borrowing money are set forth in Prob C §§9800 et seq.

8. [§302.99] Investing Money

Pending distribution of the estate, the personal representative may invest money of the estate in possession of the personal representative in any one or more of the following (Prob C §9730):

- Direct obligations of the United States, or of the State of California, maturing not later than one year from the date of making the investment.
- An interest in a money market mutual fund when the portfolio is limited to United States government obligations maturing not later than five years from the date of investment and to repurchase agreements fully collateralized by United States government obligations.

Pending distribution of the estate, upon a showing that it is to the advantage of the estate, the court may order that money of the estate in possession of the personal representative be invested in securities of the United States or of California. Prob C §9731(a).

The court may order that money of the estate in possession of the personal representative be invested in any manner provided by the will if all of the following conditions are satisfied (Prob C §9732(a)):

- The time for filing claims has expired.
- All debts have been paid or are sufficiently secured by mortgage or otherwise, or there is sufficient cash in the estate aside from the money to be invested to pay all the debts, or the court is otherwise satisfied that all the debts will be paid.
- The estate is not in a condition to be finally distributed.

9. [§302.100] Litigation

The personal representative may (Prob C §9820):

- Commence and maintain actions and proceedings for the benefit of the estate.
- Defend actions and proceedings against the decedent, the personal representative, or the estate.

Court authorization is not required. Prob C §9610.

The personal representative may also bring or defend partition actions. Prob C §9623.

10. Compromise of Claims

a. [§302.101] When Authorization Not Required

Except as provided below, if it is to the advantage of the estate, the personal representative may do any of the following without court authorization, instruction, approval, or confirmation (Prob C §9830(a)):

- Compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate, including the giving of a covenant not to sue.
- Extend, renew, or in any manner modify the terms of an obligation owing to or in favor of the decedent or the estate.
- Release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible.

This provision does not preclude the personal representative from seeking court authorization. Prob C §9830(b).

Upon petition of an interested person or upon the court's own motion, the court may limit the above authority of the personal representative. Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44). Prob C §9830(c).

If it is to the advantage of the estate, the personal representative without prior court authorization may extend, renew, or modify a lease of real property in either of the following cases (Prob C §9832(b), (c)):

- When under the lease as extended, renewed, or modified, the rental does not exceed \$5,000 a month and the term does not exceed one year (if option to extend, term considered as if extended).
- When the lease is from month to month, regardless of the amount of the rental.

b. [§302.102] When Authorization Required

Unless the time for filing creditor claims has expired, authorization by order of court is required for a compromise or settlement of a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate. Prob C §9831.

Authorization by order of court is required for a compromise, settlement, extension, renewal, or modification that affects any of the following (Prob C §9832(a)):

- Title to real property.
- An interest in real property or a lien or encumbrance on real property.
- An option to purchase real property or an interest in real property.

But this provision does not require court authorization to extend, renew, or in any manner modify the terms of an obligation owing to or running in favor of the decedent or the estate. Cal L Rev Comment to Prob C §9832.

Authorization by order of court also is required for a compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of \$25,000. Prob C §9833.

It is also required for any of the following (Prob C §9834):

- A compromise or settlement of a claim by the estate against the personal representative or the personal representative's attorney, whether or not the claim arises out of the administration of the estate.
- An extension, renewal, or modification of the terms of a debt or similar obligation of the personal representative, or the personal representative's attorney, owing to, or in favor of, the estate.

Finally, authorization by order of court is required for the compromise or settlement of a claim or right of action given to the personal representative by any law for the wrongful death or injury of the decedent, including any action brought by the personal representative in attempting enforcement of the claim or right of action. Authorization to compromise or settle the claim or right of action includes authorization to give a covenant not to sue. Prob C §9835. The court authorization is obtained from the court in which the estate is being administered. Prob C §9836.

c. [§302.103] Petition for Authorization

A petition for an order authorizing a compromise, settlement, extension, renewal, or modification may be filed by any of the following (Prob C §9837(a)):

- The personal representative.
- Any interested person who has obtained the written approval of the personal representative to file the petition.

The petition must show the terms of the compromise, settlement, extension, renewal, or modification and its advantage to the estate. Prob C §9837(b). Notice of the hearing on the petition must be given as provided in Prob C §1220 (see §302.44). Prob C §9837(c).

11. [§302.104] Real Property Transactions

After authorization, the personal representative may:

- Accept a deed in lieu of foreclosure, give a partial satisfaction of a mortgage or cause a partial reconveyance to be executed by a trustee under a trust deed held by the estate. Prob C §§9850, 9851.
- Dedicate real property (Prob C §§9900(a)).

- Exchange property (Prob C §§9920 et seq).
- Lease real property (Prob C §§9940 et seq). However, authorization is not required (Prob C §9941):
 - When the rental does not exceed \$5,000 a month and the term does not exceed one year (if option to extend, term considered as if extended).
 - When the lease is from month to month, regardless of the amount of the rental.
- Grant an option on property. Prob C §§9960 et seq; see Prob C §§9980 et seq (option in will enforceable).

I. Estate Management—Sales

1. General Provisions

a. [§302.105] When Property May Be Sold

Subject to the limitations, conditions, and requirements below, the personal representative may sell real or personal property of the estate in any of the following cases (Prob C §10000):

- When the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes.
- When the sale is to the advantage of the estate and in the best interest of the interested persons.
- When the property is directed by the will to be sold.
- When authority is given in the will to sell the property.

The above standards are separate bases for a sale; a sale need not be necessary to pay debts or devises if it is in the best interest of the estate. *Estate of Barthelmess* (1988) 198 CA3d 728, 735, 243 CR 832.

An ex parte application for authority to sell or to surrender tangible or intangible personal property must state whether the property is specifically devised. If it is specifically devised, the written consent of the specific devisee to the sale or surrender must be filed. Cal Rules of Ct 7.454.

b. [§302.106] Petition To Require Sale

If the personal representative neglects or refuses to sell the property, any interested person may petition the court for an order requiring the personal representative to sell real or personal property of the estate in any of the following cases (Prob C §10001(a)):

- The sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes.
- The sale is to the advantage of the estate and in the best interest of the interested persons.
- The property is directed by the will to be sold.

Notice of the hearing on the petition must be given as provided in Prob C §1220 (see §302.44). Prob C §10001(b). Notice of the hearing on the petition also is given to the personal representative by citation served at least five days before the hearing. Prob C §10001(c).

c. [§302.107] Directions in Will

If directions are given in the will as to the mode of selling or the particular property to be sold, the personal representative must comply with those directions. Prob C §10002(a). However, if the court determines that it would be to the advantage of the estate and in the best interest of the interested persons, the court may make an order relieving the personal representative of the duty to comply with the directions in the will. The order must specify the mode and the terms and conditions of selling or the particular property to be sold, or both. The personal representative or any interested person may file a petition for such an order. Notice of the hearing on the petition must be given as provided in Prob C §12200 (see §302.44). Prob C §10002(b).

The court may make such an order, for example, if the property directed to be sold to pay the decedent's debts has greatly increased in value since the will was executed, there is sufficient cash in the estate to pay the debts, and paying the debts with the cash would not adversely affect any of the interested persons. Or the court may determine that the mode of selling directed in the will is not appropriate under the circumstances existing at the time the property is to be sold. Cal L Rev Comment to Prob C §10002.

d. [§302.108] Manner of Sale

Subject to Prob C §§21400 et seq (abatment) and the above provisions, if estate property is required or permitted to be sold, the personal representative may (Prob C §10003):

- Use discretion as to which property to sell first.
- Sell the entire interest of the estate in the property or any lesser interest therein.
- Sell the property either at public auction or private sale.

When the personal representative determines in his or her discretion that, by use or relationship, any assets of the estate, whether real or personal, constitute a unit for purposes of sale, the personal representative may cause the property to be appraised as a unit. Prob C §10004(a).

Whether the property is appraised as a unit or not, the personal representative may sell all the assets as a unit and under one bid if the court finds that the sale of the assets as a unit to be to the advantage of the estate. Prob C §10004(b).

No private sale of the assets as a unit may be made for less than 90 percent of the sum of the appraised values of the personal property and the sum of the appraised values of the real property, appraised separately, or for less than 90 percent of the appraised value if appraised as a unit. Prob C §10004(c).

If the assets to be sold as a unit include any real property, the sale is made in the manner provided for the sale of real property, and the bid and sale are subject to the limitations and restrictions established for the sale of real property (see §302.122). If the

assets to be sold as a unit are entirely personal property, the property is sold in the manner provided for the sale of personal property (see §302.111). Prob C §10004(d).

e. [§302.109] Encumbered Property

There are provisions for the specific application of the proceeds of the sale from encumbered property. Prob C §§10360 et seq.

2. [§302.110] Sale of Securities

Securities may be sold after obtaining court authorization. Prob C §10200(b); see Prob C §10200(a) (definition of securities). To obtain an order, the personal representative or any interested person files a petition stating the terms and conditions and the advantage to the estate of the proposed sale or redemption or conversion. Prob C §10200(c). Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) and posted as provided in Prob C §230, but the court may order that the notice be given for a shorter period or dispensed with. Prob C §10200(d).

No notice of sale or of the redemption or conversion need be given if any of the following conditions are satisfied (Prob C §10200(e)):

- The minimum selling price is fixed by the court.
- The securities are to be sold on an established stock or bond exchange.
- The securities to be sold are securities designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.
- The securities are to be surrendered for redemption or conversion.

The required form of Ex Parte Petition for Authority to Sell Securities and Order is Judicial Council Form DE-270.

If the court authorizes the sale, redemption, or conversion, the court's order fixes the terms and conditions of sale, redemption, or conversion. Prob C §10200(c). Title to the securities sold or surrendered as authorized by the court order passes without the need for subsequent court confirmation. Prob C §10200(b).

3. Sale of Personal Property

a. [§302.111] Notice of Sale

Except as otherwise provided by statute, personal property of the estate may be sold only after notice of sale is given by one or both of the following methods, as the personal representative may determine (Prob C §10250):

- Posting at the county courthouse of the county in which the proceedings are pending at least 15 days before:
 - In the case of a private sale, the day specified in the notice of sale as the day on or after which the sale is to be made.

- In the case of a public auction sale, the day of the auction.
- Publication pursuant to Govt C §6063a in a newspaper in the county in which the proceedings are pending, such publication to be completed before:
 - In the case of a private sale, the day specified in the notice of sale as the day on or after which the sale is to be made.
 - In the case of a public auction sale, the day of the auction.

If it is shown that it will be to the advantage of the estate, the court may shorten the time of notice of sale to not less than five days. Prob C §10251(a). If the court makes such an order, notice of sale is given by one or both of the following methods, as the personal representative may determine (Prob C §10251(b)):

- By posting as provided in Prob C §10250 except that the posting shall be for at least five days instead of 15 days as required by Prob C §10250.
- By publication as provided in Prob C §10250 except that the publication is pursuant to Govt C §6061.

The notice of sale must state all of the following (Prob C §10253(a)):

- Whether the sale is to be a private sale or a public auction sale.
- In the case of a private sale, the place at which bids or offers will be received and a day on or after which the sale will be made or, in the case of a public auction sale, the time and place of sale.
- A brief description of the personal property to be sold.

The notice may include other matters including terms and conditions of sale. Prob C §10253(b).

b. [§302.112] Sale Without Notice

Personal property may be sold with or without notice, as the personal representative may determine, in any of the following cases (Prob C §10252):

- The property is directed by the will to be sold.
- Authority is given in the will to sell the property.
- The property is perishable, will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept.
- Sale of the property is necessary to provide for the payment of a family allowance pending receipt of other sufficient funds.

The form of Ex Parte Petition for Approval of Sale of Personal Property and Order is Judicial Council Form DE-275.

c. [§302.113] Public Auction

Unless the court orders otherwise (Prob C §10254(a)):

- A sale of personal property at a public auction sale must be made within this state at the courthouse door, at the auction house, at some other public place, or at the residence of the decedent.
- No public auction sale may be made of any tangible personal property that is not present at the time of sale.

Upon petition of the personal representative or any interested person, the court may order either or both of the following (Prob C §10254(b)):

- That a sale of personal property at public auction be made at any place within or without the United States.
- That tangible personal property need not be present at the time of sale.

The personal representative may postpone a public auction sale of personal property from time to time if all of the following conditions are satisfied (Prob C §10254(c)):

- The personal representative believes that the postponement is to the advantage of the estate.
- Notice of the postponement is given by public declaration at the time and place appointed for the sale.
- The postponement, together with previous postponements of sale of the property, do not exceed three months.

d. [§302.114] Private Sale

A private sale of personal property may not be made before the day stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day. Prob C §10255(a).

In the case of a private sale of personal property, the bids or offers must be in writing and must be left at the place designated in the notice of sale, or must be delivered to the personal representative personally or to the person specified in the notice of sale, at any time after the first publication or posting of notice of sale and before the making of the sale. Prob C §10255(b).

e. [§302.115] Bids

Whether a sale of personal property is private or at public auction, bids must substantially comply with any terms specified in the notice of sale. Prob C §10256.

f. [§302.116] Terms of Sale

Personal property may be sold for cash or on credit. Prob C §10257(a).

Except as may otherwise be ordered by the court, if a sale is made on credit, not less than 25 percent of the purchase price may be paid in cash at the time of sale, and the personal representative must do one of the following (Prob C §10257(b)):

- Take the note of the purchaser for the balance of the purchase money, with a security interest in the personal property sold, to secure the payment of the balance.

- Enter into a conditional sale contract under which title is retained until the balance is paid.

The terms of the note and security interest or conditional sale contract are approved by the court at the time of confirmation of sale. Prob C §10257(c).

If property sold by the personal representative for part cash and part deferred payments consists of an undivided interest in personal property or any other interest therein less than the entire ownership and the owner or owners of the remaining interests therein join in the sale, the note and security interest may be made to the personal representative and such others having an interest in the property. The interest of the personal representative in the note and security interest must be in the same interest and in the same proportions as the estate's interest in the property before the sale. Prob C §10257(d).

On petition of the personal representative, the court may by order authorize a sale of personal property on credit on terms providing for less than 25 percent of the purchase price to be paid in cash at the time of sale, or may waive or modify the requirement that a security interest or other lien must be retained or taken to secure payment of the balance of the purchase price, if it is shown that the terms are to the advantage of the estate and the property to be sold is of such a nature that it is impracticable to sell the property for a larger cash payment at the time of sale or to retain a security interest or other lien in the property. The order of the court fixes the terms and conditions of the sale. Prob C §10258(a).

This provision permits the court to vary the requirements of Prob C §10257 when it is impractical to meet those requirements, such as in the sale of an insurance business, a liquor license, the goodwill of a business, or the stock in trade of a merchant. But only the personal representative may petition for this variance. Cal L Rev Comment to Prob C §10258.

Notice of the hearing on the petition is posted as provided in Prob C §1230 and given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §10258(b)):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the sale.
- Each known devisee whose interest in the estate would be affected by the sale.

g. [§302.117] Title

Title to the following personal property passes upon sale without the need for court confirmation or approval (Prob C §10259(a)):

- Personal property that is perishable will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept.
- Personal property that needs to be sold to provide for the payment of a family allowance pending receipt of other sufficient funds.

Title to personal property sold at public auction passes without the need for court confirmation or approval upon receipt of the purchase price and (Prob C §10259(b)):

- In the case of tangible personal property, the delivery of the property to the purchaser.
- In the case of intangible personal property, the delivery to the purchaser of the instrument that transfers the title to the property to the purchaser.

The personal representative is responsible for the actual value of the property unless the sale is reported to and approved by the court. Prob C §10259(c).

h. [§302.118] Confirmation

Except as specifically provided in Prob C §§10200, 10201, 10202 (securities), 10259 (see §302.117), and 10503 (IAEA), all sales of personal property must be reported to and be confirmed by the court before title to the property passes to the purchaser, notwithstanding that the property is directed by the will to be sold or authority is given in the will to sell the property. Prob C §10260(a).

If the personal representative fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation of the sale. Prob C §10260(b).

Notice of the hearing on the petition for confirmation must be given as provided in Prob C §1220 (see §302.44) and posted as provided in Prob C §1230. Prob C §10260(c).

At the hearing on the petition for confirmation of the sale, the court examines the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale. If the decedent's will authorizes or directs the property to be sold, there does not need to be a showing of the necessity of the sale or the advantage to the estate and the benefit to the interested persons in making the sale. Prob C §10261(a).

Unlike the statutes governing the sale of real property, those for sale of personal property do not require that the purchase price of the property be within a specified percentage range of the amount for which the property is appraised by the probate referee. Cal L Rev Comment to Prob C §10261.

Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections. Prob C §10261(b); see Prob C §48 (definition of interested person).

Upon a showing that the fiduciary has denied any bona fide prospective buyer or his or her broker a reasonable opportunity to inspect the property, the court must not confirm the sale but must continue the sale to allow inspection unless good cause is shown for the court to confirm the sale. Cal Rules of Ct 7.451.

Before confirming the sale of a partnership interest, whether made to the surviving partner or to any other person, the court must do both of the following (Prob C §10261(c)):

- Inquire into the condition of the partnership affairs.
- Examine any surviving partner if that surviving partner is a resident within the state at the time of the hearing and able to be present in court. The court may issue a citation to compel the surviving partner to attend the hearing.

Upon its own motion or upon the request of the personal representative, the agent or broker, or any other interested person, made at the time of the confirmation hearing or at another time, the court fixes the compensation of the agent or broker. Prob C §10261(d).

If notice of the sale was required, before an order is made confirming the sale, it must be proved to the satisfaction of the court that notice of the sale was given as required, and the order of confirmation must show that such proof was made. Prob C §10263.

i. [§302.119] Overbid

If a written offer to purchase the property is made to the court at the hearing on the petition for confirmation of the sale and the new bid is at least 10 percent more than the amount stated in the report made to the court, the court in its discretion may accept the new bid and confirm the sale to the offeror, or may order a new sale, if all of the following conditions are satisfied (Prob C §10262(a)):

- The original bid as stated in the report to the court is more than \$100, or if the original bid is less than \$100, the new bid is \$100 more than the original bid.
- The new bid is made by a responsible person.
- The new bid complies with all provisions of law.

If there is more than one offer that satisfies the requirements, the court must do one of the following (Prob C §10262(b)):

- Accept the highest such offer and confirm the sale to the offeror.
- Order a new sale.

This provision does not apply to a sale of property described in Prob C §10259, when title passes without confirmation. Prob C §10262(c).

j. [§302.120] Error in Proceeding

No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the sale pursuant to an order made under these provisions. Prob C §10264.

If the court lacks jurisdiction, Prob C §10264 does not cure the defect. See *Texas Co. v Bank of America Nat'l Trust & Sav. Ass'n* (1935) 5 C2d 35, 41–44, 53 P2d 127. But Prob C §10264 does not limit the court's authority to set aside an order made through mistake, inadvertence, surprise, or excusable neglect. See CCP §473; *Estate of Lee* (1958) 159 CA2d 109, 111–112, 323 P2d 448. Cal L Rev Comment to Prob C §10264.

4. [§302.121] Sale of Partnership Interest or Chose in Action

Property of the estate that consists of a partnership interest or an interest belonging to an estate by virtue of a partnership formerly existing may be sold in the same manner as other personal property. Prob C §10204. Similarly, a chose in action belonging to the estate may be sold in the same manner as other personal property. Prob C §10205.

5. Sale of Real Property

a. [§302.122] Notice of Sale

Real property of the estate may be sold only after notice of sale has been published pursuant to Govt C §6063a (1) in a newspaper published in the county in which the real

property or some portion thereof is located or (2) if there is no such newspaper, in such newspaper as the court or judge may direct. This requirement does not apply if the personal representative has authority to sell under the IAEA. Prob C §10300(a). But the personal representative may choose to publish notice of sale to further market the property or to obtain court authorization of the terms of the sale.

The publication of notice of sale must be completed before (Prob C §10300(b)):

- In the case of a private sale, the day specified in the notice as the day on or after day on which the sale is to be made.
- In the case of a public auction sale, the day of the auction.

If it is shown that it will be to the advantage of the estate, the court may by order shorten the time of notice of sale to not less than five days. Prob C §10302(a). If the court makes an order to shorten time, notice of sale must be published as provided in Prob C §10300 except that the publication is pursuant to Govt C §6061. Prob C §10302(b).

The notice of sale must state all of the following (Prob C §10304(a)):

- Whether the sale is to be a private sale or a public auction sale.
- In the case of a private sale, the place at which bids or offers will be received and a day on or after the day on which the sale will be made or, in the case of a public auction sale, the time and place of sale.
- The street address or other common designation or, if none, a legal description of the real property to be sold.

The notice of sale may state other matters, including terms and conditions of sale. Prob C §10304(b).

b. [§302.123] Sale Without Notice

Real property may be sold with or without notice, as the personal representative may determine, in either of the following cases (Prob C §10303):

- The property is directed by the will to be sold.
- Authority is given in the will to sell the property.

If the will directs or authorizes the sale, whether notice should be given is within the discretion of the personal representative. Cal L Rev Comment to Prob C §10303.

c. [§302.124] Place and Time

A sale of real property at public auction must be made in the county in which the property is located. If the property is located in two or more counties, it may be sold in any one of them. Prob C §10305(a).

A sale of real property at public auction must be made between 9 a.m. and 9 p.m., and the sale must be made on the day specified in the notice of sale unless the sale is postponed. Prob C §10305(b).

The personal representative may postpone a public auction sale of real property from time to time if all of the following conditions are satisfied (Prob C §10305(c)):

- The personal representative believes that the postponement is to the advantage of the estate.
- Notice of the postponement is given by public declaration at the time and place appointed for the sale.
- The postponement, together with previous postponements of sale of the property, do not exceed three months in all.

A private sale of real property may not be made before the day stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day. Prob C §10306(a).

✎ **JUDICIAL TIP:** A common problem to be aware of occurs when a personal representative enters into a contract of sale before giving notice of sale. This is not proper because the Notice of Sale is supposed to solicit bids and obtain the best offer. If this occurs you may not be able to confirm the sale.

In the case of a private sale of real property, the bids or offers must be in writing and be left at the place designated in the notice of sale, or be delivered to the personal representative personally or to the person specified in the notice of sale, at any time after the first publication or posting of notice of sale and before the making of the sale. Prob C §10306(b).

d. [§302.125] Bids

Whether a sale of real property is private or at public auction, bids must substantially comply with any terms specified in the notice of sale. Prob C §10307.

e. [§302.126] Report and Confirmation

Except as provided in Prob C §10503 (IAEA), all sales of real property must be reported to and be confirmed by the court before title to the property passes to the purchaser, whether the sale is a private sale or a public auction sale and notwithstanding that the property is directed by the will to be sold or authority is given in the will to sell the property. Prob C §10308(a). The reason for return and confirmation of private sales of real property is to protect the decedent's estate from abuse of executorial discretion. *Estate of Quackenbush* (1975) 53 CA3d 751, 755-756, 125 CR 832.

The forms for Report of Sale and Petition for Order Confirming Sale of Real Property and Order Confirming Sale of Real Property are Judicial Council Forms DE-260 and DE-265.

If the personal representative fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation of the sale. Prob C §10308(b).

Notice of the hearing on the petition for confirmation filed is given as provided in Prob C §1220 (see §302.44) to the persons designated therein and to the purchasers named in the petition, and posted as provided in Prob C §1230. Prob C §10308(c).

f. [§302.127] Appraisal Requirement

No sale of real property at private sale may be confirmed by the court unless all of the following conditions are satisfied (Prob C §10309(a)):

- The real property has been appraised within one year before the date of the confirmation hearing.
- The valuation date used in the appraisal is within one year before the date of the confirmation hearing.
- The sum offered for the property is at least 90 percent of the appraised value of the property.

An appraisal of the property may be had at any time before the sale or the confirmation of sale in any of the following cases (Prob C §10309(b)):

- The property has not been previously appraised.
- The property has not been appraised within one year before the date of the confirmation hearing.
- The valuation date used in the latest appraisal is more than one year before the date of the confirmation hearing.
- The court is satisfied that the latest appraisal is too high or too low.

A new appraisal need not be made by a probate referee if the original appraisal of the property was made by a person other than a probate referee. If the original appraisal of the property was made by a probate referee, the new appraisal may be made by the probate referee who made the original appraisal without further order of the court or further request for the appointment of a new probate referee. If appraisal by a probate referee is required, a new probate referee must be appointed, using the same procedure as for the appointment of the original referee, to make the new appraisal if the original probate referee has died, has been removed, or is otherwise unable to act, or if there is other reason to appoint another probate referee. Prob C §10309(c).

g. [§302.128] Hearing

At the hearing on the petition for confirmation of the sale of the real property, the court must examine the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale. But if the decedent's will authorizes or directs the property to be sold, the court does not need to examine whether there was a showing that the sale was necessary or that there was an advantage to the estate and benefit to the interested persons in making the sale. Prob C §10310(a).

The court must examine the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable. Prob C §10310(b).

Upon a showing that the fiduciary has denied any bona fide prospective buyer or his or her broker a reasonable opportunity to inspect the property, the court must not confirm the sale but must continue the sale to allow inspection unless good cause is shown for the court to confirm the sale. Cal Rules of Ct 7.451.

Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections. Prob C §10310(c); see Prob C §48 (definition of interested person).

The court must not proceed with the hearing on a petition to confirm a sale of property unless the petitioner's attorney or petitioner, if unrepresented, is present. Cal Rules of Ct 7.452.

h. [§302.129] Overbid

If a written offer to purchase the real property is made to the court at the hearing on the petition for confirmation of the sale, the court must accept the offer and confirm the sale to the offeror if all of the following conditions are satisfied (Prob C §10311(a)):

- The offer is for an amount at least 10 percent more on the first \$10,000 of the original bid and 5 percent more on the amount of the original bid in excess of \$10,000.
- The offer is made by a responsible person.
- The offer complies with all provisions of law.

Only written offers can be accepted and confirmed. Although local practice may be to accept oral overbids at the sale confirmation hearing, to be valid under the statute, the offer must be reduced to writing before the close of the hearing. *Estate of Roberts* (1990) 225 CA3d 1017, 1022, 275 CR 575.

If there is more than one offer that satisfies the requirements, the court must accept the highest such offer and confirm the sale to the person making that offer. Prob C §10311(b).

The court may, in its discretion, decline to accept the offer that satisfies the requirements, and in such case, the court must order a new sale. Prob C §10311(c).

If the sale returned for confirmation is on credit and the higher offer is for cash or on credit, whether on the same or different credit terms, or the sale returned for confirmation is for cash and the higher offer is on credit, the court may not consider the higher offer unless the personal representative informs the court in person or by counsel before confirmation of sale that the higher offer is acceptable. Prob C §10311(d).

The amount of the original bid and any higher offer must be determined by the court without regard to any of the following (Prob C §10311(e)):

- Any commission on the amount of the bid to which an agent or broker may be entitled under a contract with the personal representative.
- Any condition of the bid that a certain amount of the bid be paid to an agent or broker by the personal representative.

i. [§302.130] Order of Confirmation

If notice of the sale was required, before an order is made confirming the sale, it must be proved to the satisfaction of the court that notice of the sale was given as required, and the order of confirmation must show that the proof was made. Prob C §10312. If a bond or additional bond is required in an order confirming sale of real estate, the court must not file the order until the additional bond is filed. Cal Rules of Ct 7.206.

The court must make an order confirming the sale to the person making the highest offer that satisfies the statutory requirements, and directing conveyances or assignments or both to be executed, if it appears to the court that all of the following requirements are satisfied (Prob C §10313(a)):

- Either the sale was authorized or directed to be made by the decedent's will or good reason existed for the sale.
- If notice of the sale was required, the proof required by Prob C §10312 has been made.
- The sale was legally made and fairly conducted.
- The amount for which the sale is to be confirmed is not disproportionate to the value of the property.
- In the case of a private sale, the sale complied with the requirements of Prob C §10309.
- If the sale is confirmed to the original bidder, it does not appear that a sum exceeding the original bid by at least 10 percent more on the \$10,000 of the original bid and 5 percent more on the amount of the original bid in excess of \$10,000, exclusive of the expenses of a new sale, may be obtained.

If it appears to the court that the above requirements are not satisfied, the court shall vacate the sale and order a new sale. Prob C §10313(c).

Upon its own motion or upon the request of the personal representative, the agent or broker, or any other interested person that is made at the time of the confirmation hearing or at another time, the court must fix the compensation of the agent or broker as provided in Prob C §§10160 et seq (see §302.138). Prob C §10313(b).

If the court orders a new sale, notice of the new sale must be given and the new sale must be conducted as if no previous sale had taken place. Prob C §10313(d).

j. [§302.131] Conveyance

Upon confirmation of the sale, the personal representative must execute a conveyance to the purchaser that must refer to the order confirming the sale and directing the conveyance to be executed. A certified copy of the order must be recorded in the office of the recorder of the county in which the real property or some portion thereof is located. Prob C §10314(a).

Upon confirmation of a sale of the decedent's interest under a contract for the purchase of real property by the decedent and after the purchaser has given a bond if one is required under Prob C §10206, the personal representative shall execute an assignment of the contract to the purchaser. Prob C §10314(b).

A conveyance made in compliance with the court order confirming the sale and directing the conveyance to be executed vests in the purchaser both of the following (Prob C §10314(c)):

- All the right, title, and interest that the decedent had in the property at the time of the decedent's death.
- Any other or additional right, title, or interest in the property acquired by the estate of the decedent, by operation of law or otherwise, prior to the sale.

An assignment made in compliance with the court order confirming the sale of the decedent's interest under a contract for the purchase of real property vests in the purchaser all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, at the time of sale. The purchaser of the decedent's interest under the contract for the purchase of the real property has the same rights and remedies against the vendor of the property as the decedent would have had if living. Prob C §10313(d).

k. [§302.132] Sale on Credit

If a sale is made on credit, the personal representative must take the note of the purchaser for the unpaid portion of the purchase money, with a mortgage or deed of trust on the property to secure payment of the note. The mortgage or deed of trust must be subject only to encumbrances existing at the date of sale and such other encumbrances as the court may approve. Prob C §10315(a).

If the personal representative sells property for part cash and part deferred payments that consists of an undivided interest in real property or any other interest therein less than the entire ownership and the owner or owners of the remaining interests therein join in the sale, the note and deed of trust or mortgage may be made to the personal representative and such others having an interest in the property. The interest of the personal representative in the note and deed of trust or mortgage must be in the same interest and in the same proportions as the estate's interest in the property before the sale. Prob C §10315(b).

l. [§302.133] Error in Proceeding

No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the sale pursuant to an order. Prob C §10316.

But if the court lacks jurisdiction, Prob C §10316 does not cure the defect. See *Texas Co. v Bank of America Nat'l Trust & Sav. Ass'n* (1935) 5 C2d 35, 41–44, 53 P2d 127. Probate Code §10316 also does not limit the court's authority to set aside an order made through mistake, inadvertence, surprise, or excusable neglect. See CCP §473; *Estate of Lee* (1958) 159 CA2d 109, 111–112, 323 P2d 448. Cal L Rev Comment to Prob C §10316.

6. [§302.134] Sale of Leasehold

If property to be sold consists of a leasehold interest, the sale must be made in the same manner as the sale of personal property of the estate. Prob C §10203(a).

But the sale of a leasehold interest must be treated the same as the sale of real property of the estate if the interest to be sold consists of any of the following (Prob C §10203(b)):

- A leasehold interest in real property with an unexpired term of 10 years or longer. For this purpose, the leasehold interest must be considered to have an unexpired term of 10 years or longer if the lessee has the right to extend the term and the term, if extended, would exceed 10 years.
- A leasehold interest in real property together with an option to purchase the leased property or some part thereof.

- A lease for the purpose of production of minerals, oil, gas, or other hydrocarbon substances, or geothermal energy.

7. [§302.135] Failure To Complete Sale

If after court confirmation of sale of real or personal property the purchaser fails to comply with the terms of sale, the court may, on petition of the personal representative, vacate the order of confirmation, order a resale of the property, and award damages to the estate against the purchaser. Prob C §10350(a).

Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44), and the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale, except that notice need not be given to a defaulting purchaser whose written consent to the petition is filed with the court before the hearing. Prob C §10350(b). The required form prescribing notice is Judicial Council Form DE-200.

Notice of the resale of the property is given in the same manner as for a sale of the property in the first instance. Prob C §10350(c).

Similarly, proceedings after notice of the resale are the same as for the sale of the property in the first instance. Prob C §10350(d).

If the property is resold, the defaulting purchaser is liable to the estate for damages equal to the sum of the following (Prob C §10350(e)):

- The difference between the contract price of the first sale and the amount paid by the purchaser at the resale.
- Expenses made necessary by the purchaser's breach.
- Other consequential damages.

The estate's loss of bargain is measured by the contract price for the first sale less the price obtained on the second sale. This differs from damages for defaults generally in that, under the general rule, the resale price is merely some evidence of value. The recoverable expenses of sale are those made necessary by the purchaser's breach, the same as under general law. Such expenses may include expenses of resale to the extent they exceed the expenses assumed by the estate under the breached contract. Consequential damages are recoverable as under general law. Such consequential damages may include sewer assessments, taxes, and fees for utilities, and insurance, security, storage, and pool and gardening expenses. Cal L Rev Comment to Prob C §10350.

The court may vacate the order of confirmation of a sale of real or personal property and make an order confirming the sale to the new high bidder if both of the following requirements are satisfied (Prob C §10351(a)):

- A petition is filed within 60 days after confirmation of the sale showing that (A) the purchaser at the sale has failed to complete the purchase and (B) a bid has been made for the property in the same or a higher amount, on the same or better terms, and in the manner prescribed in the original notice of sale.
- The sale has not been vacated pursuant to Prob C §10350.

Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44), and the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale. The notice, however, need not be given to a defaulting purchaser whose written consent to the vacation of the order confirming the sale is filed with the court before the hearing. Prob C §10351(b).

If the report and petition for confirmation of the second sale are not filed within 60 days of the confirmation of the first sale, the property may be resold only in the manner provided in Prob C §10350. Prob C §10351(c).

8. Contracts With Brokers

a. [§302.136] Real Estate Brokers

The personal representative may enter into a written contract with either or both of the following (Prob C §10150(a)):

- A licensed real estate broker to secure a purchaser for any real property of the estate. The broker may associate other licensed real estate brokers for this purpose, including use of a multiple listing service as defined in CC §1087.
- One or more agents or brokers to secure a purchaser for any personal property of the estate. If the particular property to be sold or the particular manner of sale requires that the agent or broker be licensed, the contract may be made only with an agent or broker that is so licensed.

The contract may provide for payment of a fee, commission, or other compensation out of the proceeds of sale, but the contract is binding and valid as against the estate only for such amount as the court allows pursuant to Prob C § 10160. No liability of any kind is incurred by the estate under the contract or a sale unless the sale is confirmed by the court, except for the obligations of the estate to the purchaser of personal property as to which title passes without court confirmation or approval. See Prob C §10259. The personal representative is not personally liable on the contract by reason of execution of the contract. Prob C §10150(b).

The contract may grant an exclusive right to sell property for a period not in excess of 90 days if, before execution of the contract granting an exclusive right to sell, the personal representative obtains court approval to enter into the contract upon a showing of necessity and advantage to the estate. The court may grant the approval when the personal representative is appointed or at any subsequent time upon ex parte application. The personal representative may execute one or more extensions of the contract granting an exclusive right to sell property, each extension being for a period not to exceed 90 days, if for each extension the personal representative obtains court approval to extend the contract on a showing of necessity and advantage to the estate of the extension. Prob C §10150(c).

A petition for approval of an exclusive listing under Prob C §10150(c) must state the following (Cal Rules of Ct 7.453):

- A description of the property to be sold;
- The name of the broker to be employed;

- A summary of the terms of the exclusive listing agreement or include a copy of the listing agreement; and
- A detailed statement of the facts supporting the “necessity and the advantage” to the estate of having the exclusive listing.

b. [§302.137] Auctioneers

The personal representative may enter into a written contract with any of the following (Prob C §10151(a)):

- If the public auction sale will be held in this state, an auctioneer who is qualified to conduct business under CC §§1812.600 et seq.
- If the public auction sale will be held outside this state pursuant to an order made under Prob C §10254, an auctioneer who is legally permitted in the jurisdiction where the sale will be held to conduct a public auction sale and to secure purchasers by that method for the personal property authorized to be sold by public auction sale in that jurisdiction under the court order.

The contract must be one that is legally enforceable under the law of the jurisdiction where made. Prob C §10151(b).

The contract may provide for payment to the auctioneer of a fee, commission, or other compensation out of the proceeds of sale and for reimbursement of expenses, but the contract is binding and valid as against the estate only for such amounts as the court allows pursuant to Prob C §10167. No liability of any kind is incurred by the estate under the contract or a sale unless the sale is approved by the court, except for the obligations of the estate to the purchaser of personal property as to which title passes without court confirmation or approval. The personal representative is not personally liable on the contract by reason of execution of the contract. Prob C §10151(c).

The contract may provide that personal property of two or more estates being administered by the same personal representative may be sold at the same public auction sale. Items of personal property may be sold separately or in a lot with other items from the same estate. A sale pursuant to the contract must be with reserve. The auctioneer must comply with the instructions of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters. Prob C §10150(d).

Whether or not the auctioneer has a contract with the personal representative, the fees, compensation, and expenses of an auctioneer in connection with a sale of property are limited to the amount the court, in its discretion, determines to be a reasonable compensation for the services of the auctioneer to the estate. Prob C §10167(a).

If the auctioneer has a contract with the personal representative, the amount of the compensation of the auctioneer in connection with the sale of property may not exceed the amount provided for in the contract. Prob C §10167(b).

c. [§302.138] When Commission Due

The estate is not liable to an agent, broker, or auctioneer under a contract for the sale of property or for any fee, commission, or other compensation or expenses in connection with a sale of property unless the following requirements are satisfied (Prob C §10160):

- An actual sale is made.
- If court confirmation or approval is required, the sale is confirmed or approved by the court as required.
- The sale is consummated.

In the case of real property, the requirement that an actual sale be made and be consummated requires that the estate receive the purchase price and that a deed be given to the purchaser and a mortgage or deed of trust be taken for payments due in the future. See *Estate of Rule* (1944). 25 C2d 1, 16, 152 P2d 1003; Cal L Rev Comment to Prob C §10160.

Whether or not the agent or broker has a contract with the personal representative, the fee, commission, or other compensation of an agent or broker in connection with a sale of property is limited to the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate. Prob C §10161(a). Thus, this statutory authority gives judicial control over the reasonableness of the compensation of brokers and agents. A local court rule may, for example, fix reasonable compensation as a commission of 6 percent of the original bid or sales price (whichever is appropriate under the applicable provisions), and the court may determine what constitutes reasonable compensation by applying the court rule. If an agent or broker holding a nonexclusive contract either produces the original bid returned to the court for confirmation or produces the successful overbidder, the compensation to which the agent or broker is entitled is the amount determined by the court to be a reasonable compensation for the services of the agent or broker to the estate and is subject to the applicable provisions. The court has considerable flexibility in determining the compensation of the agent or broker or the agents or brokers in connection with a sale of property. Compensation may be fixed, for example, as a percentage of the amount of the bid returned to the court for confirmation (see, *e.g.*, Prob C §10164(b)) or as a percentage of the amount for which the sale is confirmed (see, *e.g.*, Prob C §10165). The court may use one percentage (*e.g.*, 6 percent) for improved property and another (*e.g.*, 10 percent) for unimproved property. Or the court may use a schedule with the percentage decreasing as the value of the property increases (*e.g.*, 6 percent for the first \$100,000; 5 percent for amounts in excess of \$100,000). The method of computing the compensation may be prescribed by court rule, but the court rule must not conflict with the provisions of the statutes. Nothing precludes the court from fixing the compensation using a different method than a percentage of the amount bid or the amount for which the sale is confirmed. The personal representative and the agent or broker may provide in their contract for the amount or manner of computing the compensation for the sale and, although the court may fix the compensation at less than the amount provided for in the contract, the compensation allowed by the court in such a case may not exceed the contract amount. Cal L Rev Comment to Prob C §10161.

Unless the agent or broker holds a contract granting an exclusive right to sell the property, an agent or broker is not entitled to any fee, commission, or other compensation for services to the estate in connection with a sale except in the following cases (Prob C §10161(b)):

- When the agent or broker produces the original bid that is returned to the court for confirmation.
- When the property is sold on an increased bid that is made at the time of the hearing on the petition for confirmation, to a purchaser procured by the agent or broker.

Probate Code §10161(b) makes clear that an agent or broker holding a nonexclusive contract is not entitled to compensation unless the agent or broker produces the original bid returned to the court for confirmation or produces the overbidder to whom the sale is confirmed at the confirmation hearing. For example, the agent or broker holding a nonexclusive contract is not entitled to compensation in the following cases (Cal L Rev Comment to Prob C §10161):

- When the bid that was returned to the court for confirmation was submitted by a bidder not produced by an agent or broker and the sale is confirmed to that bidder.
- When the bid that was returned to the court for confirmation was submitted by a bidder produced by another agent or broker and the sale is confirmed to that bidder. See Prob C §10162.3.
- When the bid that was returned to the court for confirmation was submitted by a bidder not produced by the agent or broker who holds a nonexclusive contract, and the court at the confirmation hearing confirms the sale of the property to an overbidder not produced by the agent or broker holding the nonexclusive contract.

If the agent or broker has a contract with the personal representative, the amount of the compensation of the agent or broker in connection with the sale of property may not exceed the amount provided for in the contract. Prob C §10161(c).

Probate Code §10161(c) makes clear that the amount of the compensation of the agent or broker may not exceed the amount provided for in the contract. For example, if the contract provides for a 5 percent commission and the applicable court rule would allow a 6 percent commission, the commission awarded by the court may not exceed the 5 percent rate provided for in the contract. Cal L Rev Comment to Prob C §10161.

When the bid that was returned to the court for confirmation is made by a person who is not represented by an agent or broker and the successful bidder is represented by an agent or broker, the compensation of the agent or broker who procured the purchaser to whom the sale is confirmed may not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid. Prob C §10162(a).

This provision does not limit the compensation of the agent or broker who holds a contract under Prob C §10150 granting him or her the exclusive right to sell the property. Prob C §10162(b).

The court must allow the agent or broker who procured the purchaser to whom the sale is confirmed to receive the full amount of the compensation that is determined under Prob C §10161 on the full amount for which the sale is confirmed (Prob C §10162.3):

- If there is no agent or broker holding a contract under Prob C §10150 granting the exclusive right to sell the property; and if

- The bid returned to court for confirmation is made by a purchaser represented by an agent or broker; and if
- The court confirms the sale to that purchaser either on the bid returned to court for confirmation or on an increased bid made at the time of the hearing on the petition for confirmation.

There are specific provisions for commissions in specific situations involving bids returned and exclusive rights to sell listings. Prob C §§10162.5–10165.

Notwithstanding that a bid contains a condition that a certain amount of the bid is to be paid to an agent or broker by the personal representative, only such compensation that is proper for these provisions is allowed. Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition. Prob C §10166.

- ✦ **JUDICIAL TIP:** The California Law Revision Comments to Prob C §10161 contain 19 examples of when brokers' commissions are due under the provisions of Prob C §§10161–10166, when there are multiple brokers.

d. [§302.139] No Commission When Broker Is Purchaser

The estate is not liable to an agent or broker under a contract for the sale of property or for any fee, commission, or other compensation or expenses in connection with sale of the property in either of the following cases (Prob C §10160.5):

- When the agent or broker, directly or indirectly, is the purchaser of the property.
- When the agent or broker, representing the purchaser to whom the sale is confirmed, has any interest in the purchaser.

This provision extends to the situation where there is not complete identity between broker and purchaser but the broker does have an interest in the purchasing entity, whether that interest is substantial or insubstantial. Thus, for example, the broker would not be entitled to a commission if the purchaser is a corporation in which the broker owns stock. Cal L Rev Comment to Prob C §10160.5.

9. [§302.140] Liability of Personal Representative

The personal representative is liable to an interested person for damages suffered by the interested person by reason of the neglect or misconduct of the personal representative in the proceedings in relation to a sale. Prob C §10380.

In addition to any other damages for which the personal representative is liable, if the personal representative fraudulently sells real property of the estate contrary to or otherwise than under the statutory provisions, the person having an estate of inheritance in the real property may recover from the personal representative, as liquidated damages, an amount equal to double the fair market value of the real property sold on the date of sale. Prob C §10381. The surety on the personal representative's bond is liable only for the damages under Prob C §10380 up to the limits on the bond. See *Weihe v Statham* (1885) 67 C 245, 7 P 673; Cal L Rev Comment to Prob C §10381.

No action for the recovery of property sold by a personal representative on the claim that the sale is void may be maintained by an heir or other person claiming under the

decedent unless the action is commenced within whichever of the following is the later time (Prob C §10382(a)):

- Three years after the settlement of the final account of the personal representative.
- Three years after the discovery of any fraud upon which the action is based.

This limitation period is not tolled for any reason. Prob C §10382(b).

J. Compensation

1. Compensation of Personal Representative

a. [§302.141] Ordinary Compensation

For ordinary services the personal representative is entitled to receive compensation based on the value of the estate accounted for by the personal representative, as follows (Prob C §10800(a)):

- 4 percent on the first \$100,000.
- 3 percent on the next \$100,000.
- 2 percent on the next \$800,000.
- 1 percent on the next \$9,000,000.
- ½ of 1 percent on the next \$15,000,000.
- For all amounts above \$25,000,000, a reasonable amount to be determined by the court.

The court does not have discretion to decrease the statutory fee award. *Estate of Getty* (1983) 143 CA3d 455, 465–466, 191 CR 897.

The value of the estate accounted for by the personal representative is the total amount of the appraisal value of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Prob C §10800(b). The fee is calculated based on the net receipts of a business, not the gross receipts. *Estate of Sanchez* (1995) 33 CA4th 239, 242–243, 39 CR2d 141.

b. [§302.142] Extraordinary Compensation

In addition, the court may allow additional compensation for extraordinary services by the personal representative in an amount that the court determines is just and reasonable. Prob C §10801(a). Even though services are extraordinary, the court has discretion whether or not to award compensation for them. *Estate of Walker* (1963) 221 CA2d 792, 795–796, 34 CR 832 (extraordinary services by executor and estate attorney). Cal L Rev Comment to Prob C §10801; Cal Rules of Ct 7.703(a); *Estate of Gilkison* (1998) 65 CA4th 1443, 1448, 77 CR2d 463. The burden of proving the necessity for the services is on the representative claiming extraordinary fees for himself and his attorney. *Estate of Fulcher* (1965) 234 CA2d 710, 718, 44 CR 861.

The following is a nonexclusive list of activities for which extraordinary compensation may be awarded to the personal representative (Cal Rules of Ct 7.703(b)):

- Selling, leasing, exchanging, financing, or foreclosing real or personal property;
- Carrying on decedent's business if necessary to preserve the estate or under court order;
- Preparing tax returns; and
- Handling audits or litigation connected with tax liabilities of the decedent or of the estate.

The following additional services by the personal representative may be considered as extraordinary (Cal L Rev Comment to Prob C §10801):

- Court proceedings to determine testator's intention concerning undisclosed beneficiaries. *Estate of Feldman* (1947) 78 CA2d 778, 793–794, 178 P2d 498 (extraordinary fees of executor and estate attorney).
- Defense of personal representative's account (answering interrogatories; attending depositions; conferring with attorneys to prepare for depositions, interrogatories, and trial; attending trial). *Estate of Beach* (1975) 15 C3d 623, 644–645, 125 CR 570 (extraordinary fees of executor and estate attorney).

A petition for extraordinary compensation must include, or be accompanied by, a statement of the facts upon which the petition is based. The statement of facts must (Cal Rules of Ct 7.702):

- Show the nature and difficulty of the tasks performed;
- Show the results achieved;
- Show the benefit of the services to the estate;
- Specify the amount requested for each category of service performed;
- State the hourly rate of each person who performed services and the hours spent by each of them;
- Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and
- State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.

c. [§302.143] Payment of Tax Experts

The personal representative may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action that such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation that may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services. Prob C §10801(b).

d. [§302.144] Effect of Will Provisions

If the decedent's will makes provision for the compensation of the personal representative, the compensation provided by the will is the full and only compensation for the services of the personal representative. Prob C §10802(a). This provision gives the

testator the ability to provide for alternative methods of compensation in the will. For example, the will can eliminate the distinction between ordinary and extraordinary services and substitute an hourly rate or rates for the various services to be provided by the personal representative. The statutory compensation provisions are thus default provisions that apply if the will does not make provision for the compensation of the personal representative. This provision also permits the personal representative to receive a greater amount of compensation than the statutory compensation if the decedent's will provides for the greater amount of compensation. Compare *Estate of Van Every* (1944) 67 CA2d 164, 153 P2d 614. Cal L Rev Comment to Prob C §10802.

The personal representative may petition the court to be relieved from a provision of the will that provides for the compensation of the personal representative. Prob C §10802(b). Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §10802(c)):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

If the court determines that it is to the advantage of the estate and in the best interest of the persons interested in the estate, the court may make an order authorizing compensation for the personal representative in an amount greater than provided in the will (Prob C §10802(d)), but an agreement between the personal representative and an heir or devisee for higher compensation is void. Prob C §10803.

e. [§302.145] No Advance Payment

The personal representative must neither pay nor receive, and the attorney for the personal representative must not receive, statutory commissions or fees or fees for extraordinary services in advance of an order of the court authorizing payment. Cal Rules of Ct 7.700(a). In addition to removing the personal representative and imposing any other sanctions authorized by law against the personal representative or the attorney for the personal representative, the court may surcharge the personal representative for payment or receipt of statutory commissions or fees or fees for extraordinary services in advance of an order of the court authorizing their payment. The surcharge may include interest at the legal rate from the date of payment. Cal Rules of Ct 7.700(b).

Even if the personal representative has full IAEA authority, a court order must be obtained to pay statutory fees. Prob C §10501(a)(1), (2).

f. [§302.146] Personal Representative Who Is Attorney

Notwithstanding any provision in the decedent's will, a personal representative who is an attorney is entitled to receive the personal representative's compensation, but may not receive compensation for services as the attorney for the personal representative unless the court specifically approves the right to the compensation in advance and finds

that the arrangement is to the advantage, benefit, and best interests of the decedent's estate. Prob C §10804; Cal Rules of Ct 7.706(a). The term "estate attorney" is to be given a broad meaning for the purposes of this provision and includes the associates, partners, and attorneys of counsel with the law firm of the attorney retained by the personal representative as estate attorney, and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney retained by the personal representative as estate attorney, if the personal representative will share in the compensation that would be paid to the law firm. See also *In re Estate of Parker* (1926) 200 C 132, 135–136, 251 P 907. Cal L Rev Comment to Prob C §10804.

A law firm of which the personal representative is a partner or shareholder may request compensation for legal services in addition to the personal representative's compensation if a written agreement not to participate in each other's compensation, signed by the personal representative and by authorized representatives of the law firm, has been filed in the estate proceeding. Cal Rules of Ct 7.706(b).

g. [§302.147] Two or More Representatives

If there are two or more personal representatives, the personal representative's compensation is apportioned among the personal representatives by the court according to the services actually rendered by each personal representative or as agreed to by the personal representatives. Prob C §10805.

There is one statutory commission for ordinary services by the personal representative of the estate and one statutory attorney fee for ordinary legal services to the personal representative, regardless of the number of personal representatives or attorneys performing the services. The court may apportion statutory commissions and fees among multiple, successive, and concurrent personal representatives or attorneys. The apportionment must be based on the agreement of the multiple personal representatives or attorneys or, if there is no agreement, according to the services actually rendered by each of them. Cal Rules of Ct 7.704(a).

h. [§302.148] Payment on Account

The court may authorize an allowance of statutory fees or commissions on account before approval of the final account and the decree of final distribution. Any allowance made before settlement of the final account must be low enough to avoid the possibility of overpayment. The allowance (Cal Rules of Ct 7.701):

- Must be based on the estimated amount of statutory compensation payable on the estate determined as of the date of the petition for allowance;
- Must be in proportion to the work actually performed; and
- Must be based upon a detailed description of the ordinary services performed and remaining to be performed.

2. Compensation of Attorney

a. [§302.149] Ordinary Compensation

For ordinary services the attorney for the personal representative must receive compensation based on the value of the estate accounted for by the personal representative, as follows (Prob C §10810(a)):

- 4 percent on the first \$100,000.
- 3 percent on the next \$100,000.
- 2 percent on the next \$800,000.
- 1 percent on the next \$9,000,000
- ½ of 1 percent on the next \$15,000,000.
- For all amounts above \$25,000,000, a reasonable amount to be determined by the court.

The court does not have discretion to decrease a fee award. *Estate of Getty* (1983) 143 CA3d 455, 465–466, 191 CR 897.

The value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Prob C §10810(b). The calculation is made as of the time of the final distribution regardless of whether the value of the estate has increased or decreased.

b. [§302.150] No Advance Payment

The personal representative must neither pay nor receive, and the attorney for the personal representative must not receive, statutory commissions or fees or fees for extraordinary services in advance of an order of the court authorizing their payment. Cal Rules of Ct 7.700(a).

c. [§302.151] Extraordinary Compensation

In addition, the court may allow additional compensation for extraordinary services by the attorney for the personal representative in an amount that the court determines is just and reasonable. Prob C §10811(a). The grant or denial of such fees is addressed to the sound discretion of the probate court. *Estate of Gilkison* (1998) 65 CA4th 1443, 1448, 77 CR2d 463. The probate court is not bound by an agreement as to amount of attorney's fees made between the estate's administrator and a third party; the award of extraordinary fees is within the court's discretion. *Estate of Baum* (1989) 209 CA3d 744, 750, 257 CR 566.

The following is a nonexclusive list of activities for which extraordinary compensation may be awarded to the attorney for the personal representative (Cal Rules of Ct 7.703(c)):

- Legal services in connection with the sale of property held in the estate;
- Services to secure a loan to pay estate debts;

- Litigation undertaken to benefit the estate or to protect its interests;
- Defense of the personal representative's account;
- Defense of a will contested after its admission to probate;
- Successful defense of a will contested before its admission to probate;
- Successful defense of a personal representative in a removal proceeding;
- Extraordinary efforts to locate estate assets;
- Litigation in support of attorney's request for extraordinary compensation, where prior compensation awards are not adequate compensation under all the circumstances. See *Estate of Trynin* (1989) 49 C3d 868, 880, 264 CR 93 (upholding awarded fees relating to obtaining extraordinary compensation for attorney);
- Coordination of ancillary administration; and
- Accounting for a deceased, incapacitated, or absconded personal representative under Prob C §10953.

➤ **JUDICIAL TIP:** In exercising your discretion, you may consider whether the statutory fee adequately compensates counsel.

The burden of proving the necessity for the services is on the representative claiming extraordinary fees for him or herself and his or her attorney. *Estate of Fulcher* (1965) 234 CA2d 710, 718, 44 CR 861.

Extraordinary services by the attorney for which the court may allow compensation include services by a paralegal performing the extraordinary services under the direction and supervision of an attorney. The petition for compensation must set forth the hours spent and services performed by the paralegal, and state why it was appropriate to use the paralegal's services and demonstrate that the total for the attorney and paralegal services does not exceed the amount if the attorney had performed the services without the paralegal. Prob C §10811(b); see Cal Rules of Ct 7.703(e) (contents of petition and qualifications of paralegal).

A petition for extraordinary compensation must include, or be accompanied by, a statement of the facts upon which the petition is based. The statement of facts must (Cal Rules of Ct 7.702):

- Show the nature and difficulty of the tasks performed;
- Show the results achieved;
- Show the benefit of the services to the estate;
- Specify the amount requested for each category of service performed;
- State the hourly rate of each person who performed services and the hours spent by each of them;
- Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and
- State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.

d. [§302.152] Contingent Fees

An attorney for the personal representative may agree to perform extraordinary service on a contingent fee basis subject to the following conditions (Prob C §10811(c); Cal Rules of Ct 7.703(d)):

- The agreement is written and complies with all the requirements of Bus & P C §6147.
- The agreement is approved by the court following a hearing notice as provided in Prob C §10812.
- The court must approve the agreement in the manner provided in Prob C §10811(c), based on findings that the compensation under the agreement is just and reasonable, that the agreement is to the advantage of the estate, and that the agreement is in the best interest of the persons interested in the estate.

In the absence of an emergency or other unusual circumstances, the personal representative must obtain the court's approval of the contingency fee agreement before services are performed under it. Cal Rules of Ct 7.703(d)(3).

e. [§302.153] Effect of Will Provisions

If the decedent's will provides for the compensation of the attorney for the personal representative, the compensation provided by the will is the full and only compensation for the services of the attorney for the personal representative. Prob C §10812(a). The personal representative or the attorney for the personal representative may petition the court to be relieved from a provision of the will that provides for the compensation of the attorney for the personal representative. Prob C §10812(b).

Notice of the hearing on the petition is given in the same manner as for a petition for relief by the personal representative. Prob C §10812(c).

If the court determines that it is to the advantage of the estate and in the best interest of the persons interested in the estate, the court may make an order authorizing compensation for the attorney in an amount greater than provided for in the will. Prob C §10812(c)(5).

An agreement between the personal representative and the attorney for higher compensation for the attorney than that provided by statute is void. Prob C §10813.

f. [§302.154] Two or More Attorneys

If there are two or more attorneys for the personal representative, the attorney's compensation is apportioned among the attorneys by the court according to the services actually rendered by each attorney or as agreed to by the attorneys. Prob C §10814.

There is one statutory commission for ordinary services by the personal representative of the estate and one statutory attorney fee for ordinary legal services to the personal representative, regardless of the number of personal representatives or attorneys performing the services. The court may apportion statutory commissions and fees among multiple, successive, and concurrent personal representatives or attorneys. The apportionment must be based on the agreement of the multiple personal

representatives or attorneys or, if there is no agreement, according to the services actually rendered by each of them. Cal Rules of Ct 7.704(a).

3. [§302.155] Petition for Interim Compensation

At any time after four months from the issuance of letters (Prob C §10830(a)):

- The personal representative may file a petition requesting an allowance on the compensation of the personal representative. See Cal Rules of Ct 7.705 (calculation of fee in petition).
- The personal representative or the attorney for the personal representative may file a petition requesting an allowance on the compensation of the attorney for the personal representative.

Notice of the hearing on the petition is given as provided in Prob C §1220 to all of the following persons (Prob C §10830(b)):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

The required form of order prescribing notice is Judicial Council Form DE-200.

On the hearing, the court may make an order allowing the portion of the compensation of the personal representative or the attorney for the personal representative, as the case may be, on account of services rendered up to that time, that the court determines is proper. The order must authorize the personal representative to charge the amount allowed against the estate. Prob C §10830(c).

At the time of the filing of the final account and petition for an order for final distribution (Prob C §10831(a)):

- The personal representative may petition the court for an order fixing and allowing the personal representative's compensation for all services rendered in the estate proceeding.
- The personal representative or the attorney for the personal representative may petition the court for an order fixing and allowing the compensation, of the attorney for all services rendered in the estate proceeding.

The request for compensation may be included in the final account or the petition for final distribution or may be made in a separate petition. Prob C §10831(b).

Notice of the hearing on the petition is given in the same manner as for a petition for an allowance on the compensation. Prob C §10831(c)

On the hearing, the court makes an order fixing and allowing the compensation for all services rendered in the estate proceeding. In the case of an allowance to the personal representative, the order authorizes the personal representative to charge the amount allowed against the estate, less any amount previously charged against the estate pursuant to Prob C §10830. In the case of the attorney's compensation, the order requires the

personal representative to pay the attorney out of the estate the amount allowed, less any amount paid to the attorney out of the estate pursuant to Prob C §10830. Prob C §10831(d).

The court may allow compensation to the personal representative or to the attorney for the personal representative for extraordinary services before final distribution when any of the following requirements is satisfied (Prob C §10832):

- It appears likely that administration of the estate will continue, whether due to litigation or otherwise, for an unusually long time.
- Present payment will benefit the estate or the beneficiaries of the estate.
- Other good cause is shown.

In some cases, present payment will benefit the estate. For example, compensation may be allowed near the end of a tax year to absorb estate income so that the income will not be taxable. Partial payment also may be allowed at any time during the year if good cause is shown. Cal L Rev Comment to Prob C §10832.

4. [§302.156] Reduction of Compensation

The court may reduce the compensation of the personal representative or the attorney for the personal representative by an amount the court determines to be appropriate if the court makes all of the following determinations (Prob C §12205(a); see *Estate of Heller* (1993) 7 CA4th 862, 865–866, 9 CR2d 274 (personal administrator fees denied based on delay and prejudice)):

- The time taken for administration of the estate exceeds the time required by this statute or prescribed by the court.
- The time taken was within the control of the personal representative or attorney whose compensation is being reduced.
- The delay was not in the best interest of the estate or interested persons.

An order reducing compensation may be made regardless of whether the compensation otherwise allowable under Prob C §§10800 et seq would be reasonable compensation for the services rendered by the personal representative or attorney. Prob C §12205(b).

An order may be made at any of the following hearings (Prob C §12205(c)):

- The hearing for final distribution.
- The hearing for an allowance on the compensation of the personal representative or attorney.

In making a determination, the court must take into account any action taken under Prob C §12202 as a result of a previous delay. Prob C §12203(d).

K. Account

1. [§302.157] Court Order for Account

On its own motion or on petition of an interested person, the court may order an account at any time. Prob C §10950(a).

The court must order an account on petition of an interested person made more than one year after the last account was filed or, if no previous account has been filed, made more than one year after issuance of letters to the personal representative. Prob C §10950(b).

The court order must specify the time within which the personal representative must file an account. Prob C §10950(c).

On court order, or on request by an interested person filed with the clerk and a copy served on the personal representative, the personal representative must produce for inspection and audit by the court or interested person the documents specified in the order or request that support an account. Prob C §10901.

2. [§302.158] Contents of Account

An account includes both a financial statement and a report of administration as provided in Prob C §1060. Prob C §10900(a).

The statement of liabilities in the report of administration must include the following information (Prob C §10900(b)):

- Whether notice to creditors was given under Prob C §9050.
- Creditor claims filed, including the date of filing the claim, the name of the claimant, the amount of the claim, and the action taken on the claim.
- Creditor claims not paid, satisfied, or adequately provided for. As to each such claim, the statement must indicate whether the claim is due and the date due, the date any notice of rejection was given, and whether the creditor has brought an action on the claim. The statement must identify any real or personal property that is security for the claim, whether by mortgage, deed of trust, lien, or other encumbrance.

All accounts must state the period covered by the account and contain a summary showing all of the following, to the extent applicable (Prob C §1061(a)):

- The property on hand at the beginning of the period covered by the account, which is the value of the property initially received by the fiduciary if this is the first account, and is the property on hand at the end of the prior account if this is a subsequent account.
- The value of any assets received during the period of the accounting that are not assets on hand as of the commencement of the administration of an estate.
- The amount of any receipts of income or principal, excluding items listed above or receipts from a trade or business.
- Net income from a trade or business.
- Gains on sales.

- The amount of disbursements, excluding disbursements for distributions or for a trade or business.
- Loss on sales.
- Net loss from trade or business.
- Distributions to beneficiaries and the ward or conservatee.
- Property on hand at the end of the accounting period, stated at its carry value.

The statute provides a format for the summary. Prob C §1061(b). Total charges must equal total credits. Prob C §1061(c).

The summary must be supported by detailed schedules showing the following (Prob C §1062):

- Receipts, showing the nature or purpose of each item, the source of the receipt, and the date thereof.
- Disbursement, including the nature or purpose of each item, the name of the payee, and the date thereof.
- Net income or loss from a trade or business, which is sufficient if it provides the information disclosed on Schedule C or F of the federal income tax return.
- Calculation of gains or losses on sale or other disposition.
- Distributions of cash or property to beneficiaries and ward or conservatee, showing the date and amount of each, with the distribution of property shown at its carry value.
- Itemized list of property on hand, describing each item at its carry value.

In all accounts, there must be an additional schedule showing the estimated market value of the assets on hand as of the end of the accounting period, and a schedule of the estimated market value of the assets on hand as of the beginning of the accounting period for all accounts subsequent to the initial account. The fiduciary may make a good faith estimate of the value of real estate, a closely held business, or other assets without a ready market to satisfy the estimated value requirement. Prob C §1063(a).

If there were purchases or other changes in the form of assets occurring during the period of the account, there must be a schedule showing these transactions. However, no reporting is required for transfers between cash or accounts in a financial institution or money market mutual funds as defined in Prob C §8901(d). Prob C §1063(b).

If an estate of a decedent or a trust will be distributed to an income beneficiary, there must be a schedule showing an allocation of receipts and disbursements between principal and income. Prob C §1063(c).

If there is specifically devised property, there must be an additional schedule accounting for income, disbursements, and proceeds of sale pursuant to Prob C §§12002, 16340(a). Prob C §1063(d).

If any interest has been paid or is to be paid under Prob C §12003, §12004, §12005, or §16340(b), there must be a schedule showing the calculation of the interest. Prob C §1063(e).

If the accounting contemplates a proposed distribution, there must be a schedule setting forth the proposed distribution, including the allocation of income required under

Prob C §12006. If the distribution requires an allocation between trusts, the allocation is set forth on the schedule, unless the allocation is to be made by a trustee after receipt of the assets. If the distribution requires valuation of assets as of the date of distribution, the schedule must set forth the fair market value of those assets. Prob C §1063(f).

If, at the end of the accounting period, there are liabilities of the estate, except current or future periodic payments, including rent, salaries, utilities, or other recurring expenses, there must be a schedule showing all of the following (Prob C §1063(g)):

- All liabilities that are a lien on estate assets.
- Taxes due but unpaid as shown on filed returns or assessments received subsequent to filing of returns.
- All notes payable.
- Any judgments for which the estate is liable.
- Any other material liability.

3. [§302.159] Final Account

The personal representative must file a final account and petition for an order for final distribution of the estate when the estate is in a condition to be closed. Prob C §10951.

4. [§302.160] Account on Resignation, Removal, Incapacity, or Death

A personal representative who resigns or is removed from office or whose authority is otherwise terminated must, unless the court extends the time, file an account not later than 60 days after termination of authority. If the personal representative fails to file the account, the court may compel the account pursuant to Prob C §11050. Prob C §10952.

There are provisions for death or incapacity of the personal representative. Prob C §10953.

5. [§302.161] Waiver of Account

The personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate (Prob C §10954(a)):

- The person has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied.
- Adequate provision has been made for satisfaction in full of the person's interest. This does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

A waiver or acknowledgment is executed as follows (Prob C §10954(b)):

- If the person entitled to distribution is an adult and competent, by that person.
- If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver or acknowledgment is executed by a guardian of the estate of the minor, the waiver or acknowledgment

- may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.
- If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.
 - If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court. In the case of a trust that is subject to the continuing jurisdiction of the court pursuant to Prob C §§17300 et seq, the waiver or acknowledgment may be executed without the need to obtain approval of the court.
 - If the person entitled to distribution is an estate, by the personal representative of the estate. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the estate is being administered.
 - If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to represent the person entitled to distribution, by the guardian ad litem.
 - If the person entitled to distribution has designated an attorney in fact who has the power under the power of attorney to execute the waiver or acknowledgment, by either of the following:
 - The person entitled to distribution if an adult and competent.
 - The attorney in fact.

Notwithstanding a waiver (Prob C §10954(c)):

- The personal representative must file a final report of administration at the time the final account would otherwise have been required. The final report must include the amount of compensation paid or payable to the personal representative and to the attorney for the personal representative and must set forth the basis for determining the amounts.
- A creditor whose interest has not been satisfied may petition under Prob C §10950 for an account.

The report required when an account has been waived must list the information required by law, including information as to (Cal Rules of Ct 7.550(b)):

- Creditors' claims;
- Sales, purchases, or exchanges of assets;
- Changes in the form of assets;
- Assets on hand;
- Whether the estate is solvent;

- Detailed schedules of receipts and gains or losses on sale (where an amount other than the amount of the Inventory and Appraisal is used as a basis for calculating fees or commissions);
- Costs of administration (if reimbursement of these costs is requested);
- The amount of any fees or commissions paid or to be paid;
- Graduated filing fee adjustments (Cal Rules of Ct 7.552).

The details of receipts and disbursements need not be listed in the report. Cal Rules of Ct 7.550(a).

6. [§302.162] Petition for Approval

The personal representative gives notice of the hearing on the petition for approval of an account as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §11000(a)):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the account.
- Each known devisee whose interest in the estate would be affected by the account.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest would be affected by the account.
- If the estate is insolvent, each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part.

If the petition for approval of the account requests allowance of all or a portion of the compensation of the personal representative or the attorney for the personal representative, the notice of hearing must so state. Prob C §11000(b).

If the account is a final account and is filed together with a petition for an order for final distribution of the estate, the notice of hearing must so state. Prob C §11000(c).

7. [§302.163] Contents of Petition for Approval

The petition for approval of the account or a report accompanying the petition must contain all of the following (Prob C §1064(a)):

- A description of all sales, purchases, changes in the form of assets, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedule.
- An explanation of any unusual items appearing in the account.
- A statement of all compensation paid from the assets subject to the account to the fiduciary or to the attorneys for the fiduciary other than pursuant to a prior court order.
- A statement disclosing any family or affiliate relationship between the fiduciary and any agent hired by the fiduciary during the accounting period.

Note: “Family” means a relationship created by blood or marriage. “Affiliate” means an entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, the fiduciary. Prob C §1064(c).

- An allegation disclosing whether all of the cash has been invested and maintained in interest bearing accounts or in investments authorized by law or the governing instrument, except for an amount of cash that is reasonably necessary for the orderly administration of the estate.

The filing of an account is deemed to include a petition that requests its approval and may include additional petitions for authorization, instruction or confirmation authorized by the code, including, but not limited to, a request for an order for compensation of the fiduciary and the attorney for the fiduciary. Prob C §1064(b).

8. [§302.164] Contest

An interested person may appear and respond. Prob C §1043(a). An “interested person” includes an heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent that may be affected by the proceeding or a fiduciary representing an interested person. Prob C §48. If the response is made orally at the hearing, the court in its discretion may either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of allowing a response or objection to be made in writing. Prob C §1043(b).

All matters relating to an account may be contested for cause shown, including, but not limited to (Prob C §11001):

- The validity of an allowed or approved claim not reported in a previous account and not established by judgment.
- The value of property for purposes of distribution. This permits a contest of the value of property for purposes of distribution only, and not of the inventory and appraisal; a separate procedure is provided for a direct contest of appraisal values (see §302.68). Cal L Rev Comment to Prob C §11001.
- Actions taken by the personal representative not previously authorized or approved by the court, subject to Prob C §10590 (Independent Administration of Estates Act).

If there is a surety who has filed a court bond in the proceeding, the person objecting to the account must notify the surety by mail. Prob C §1213(a).

The court may conduct any hearing that may be necessary to settle the account, and may cite the personal representative to appear before the court for examination. Prob C §11002(a).

The court may appoint one or more referees to examine the account and make a report on the account, subject to confirmation by the court. The court may allow a reasonable compensation to the referee to be paid out of the estate. Prob C §11002(b).

The court may make any orders that the court deems necessary to effectuate these provisions. Prob C §11002(c).

If the court determines that the contest was without reasonable cause and in bad faith, the court may award the compensation and costs of the personal representative and other expenses and costs of litigation against the contestant, including attorney's fees, incurred to defend the account. The amount awarded is a charge against any interest of the contestant in the estate and the contestant is personally liable for any amount that remains unsatisfied. Prob C §11003(a).

If the court determines that the opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the compensation or other interest of the personal representative in the estate and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied. Prob C §11003(b).

If the court continues a matter to allow a written objection or response to be made, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived. Cal Rules of Ct 7.801.

9. [§302.165] Finality of Order

When the order settling the account becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the order. Prob C §7250(a). This provision does not apply if the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact. Misrepresentation includes, but is not limited to, the omission of a material fact. Prob C §7250(c).

10. [§302.166] Allowance of Expenses

The personal representative is allowed all necessary expenses in the administration of the estate, including, but not limited to, necessary expenses in the care, management, preservation, and settlement of the estate. Prob C §11004.

11. [§302.167] Payment of Debt Without Claim

If a debt has been paid within the time prescribed in Prob C §9154 but without a claim having been filed and established in the manner prescribed by statute, the court, in settling the account, must allow the amount paid if all of the following are proven (Prob C §11005):

- The debt was justly due.
- The debt was paid in good faith.
- The amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness.
- The estate is solvent.

12. [§302.168] Compelling Account by Contempt

If the personal representative does not file a required account, the court shall compel the account by punishment for contempt. Prob C §11050.

A citation shall be issued, served, and returned, requiring a personal representative who does not file a required account to appear and show cause why the personal representative should not be punished for contempt. Prob C §11051(a).

If the personal representative purposefully evades personal service of the citation, the personal representative shall be removed from office. Prob C §11051(b).

If the personal representative does not appear and file a required account, after having been duly cited, the personal representative may be punished for contempt or removed from office, or both, in the discretion of the court. Prob C §11052.

L. Payment of Debts

1. [§302.169] Priority for Payment of Debts

Debts are to be paid in the following order of priority among classes of debts, except that debts owed to the United States or to California that have preference under the laws of the United States or of California are given the preference required by such laws (Prob C §11420(a)):

- Expenses of administration. With respect to obligations secured by mortgage, deed of trust, or other lien, including, but not limited to, a judgment lien, only those expenses of administration incurred that are reasonably related to the administration of that property by which obligations are secured are given priority over these obligations.
- Obligations secured by a mortgage, deed of trust, or other lien, including, but not limited to, a judgment lien, in the order of their priority, so far as they may be paid out of the proceeds of the property subject to the lien. If the proceeds are insufficient, the part of the obligation remaining unsatisfied are classed with general debts.
- Funeral expenses.
- Expenses of last illness.
- Family allowance.
- Wage claims. “Wage claim” means a claim for wages, not exceeding two thousand dollars (\$2,000), of each employee of the decedent for work done or personal services rendered within 90 days before the death of the decedent. Prob C §11402.
- General debts, including judgments not secured by a lien and all other debts not included in a prior class.

“Debt” means (Prob C §11401):

- A claim that is established under Prob C §9000 or that is otherwise payable in the course of administration.
- An expense of administration.

- A charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance.

Except as otherwise provided by statute, the debts of each class are without preference or priority over one another. No debt of any class may be paid until all those of prior classes are paid in full. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class is paid a proportionate share. Prob C §11420(b).

2. [§302.170] Immediate Payment by Personal Representative

Subject to the above order of payment, as soon as the personal representative has sufficient funds, after retaining sufficient funds to pay expenses of administration, the personal representative shall pay the following without court order (Prob C §11421):

- Funeral expenses.
- Expenses of last illness.
- Family allowance.
- Wage claims. “Wage claim” means a claim for wages, not exceeding two thousand dollars (\$2000), of each employee of the decedent for work done or personal services rendered within 90 days before the death of the decedent. Prob C §11402.

This provision is an exception to the rule of Prob C §11422 (payment of debts on court order) in that payment under Prob C §11421 is required even though the court has not ordered payment. Cal L Rev Comment to Prob C §11421.

3. [§302.171] Court Order for Payment

Except as provided in Prob C §11421 (see §302.170), the personal representative is not required to pay a debt until payment has been ordered by the court. Prob C §11422(a).

On the settlement of any account of the personal representative after the expiration of four months after the date letters are first issued to a general personal representative, the court must order payment of debts, as the circumstances of the estate permit. If property in the estate is insufficient to pay all of the debts, the order must specify the amount to be paid to each creditor. Prob C §11422(b).

The personal representative must pay a debt to the extent of the order for payment of the debt, and is liable personally and on the bond, if any, for failure to make the payment. Prob C §11424.

Accrual of interest on debts is set forth in Prob C §11423.

4. [§302.172] Final Account

If the estate will be exhausted by the payment ordered, the account of the personal representative constitutes a final account, and notice of hearing is the notice given for the hearing of a final account. The personal representative is entitled to a discharge when the personal representative has complied with the terms of the order. Prob C §11422(c).

This does not prevent a personal representative from settling an account of the personal representative for payment of a debt made without prior court authorization. Prob C §11422(d).

5. [§302.173] Creditor Not Found

If an estate is in all other respects ready to be closed, and it appears to the satisfaction of the court, on affidavit or evidence taken in open court, that a debt has not been and cannot be paid because the creditor cannot be found, the court must make an order fixing the amount of the payment and directing the personal representative to deposit the payment with the county treasurer of the county in which the proceeding is pending. Prob C §11428(a).

6. Allocation of Debt

a. [§302.174] Petition for Allocation

If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt. Prob C §11440. A petition may be made for allocation of a debt of the decedent or of the surviving spouse even though the creditor has not made a claim and the debt has not been established. Cal L Rev Comment to Prob C §11140.

The petition must include a statement of all of the following (Prob C §11441):

- All debts of the decedent and surviving spouse known to the petitioner that are alleged to be subject to allocation and whether paid in whole or part or unpaid.
- The reason why the debts should be allocated.
- The proposed allocation and the basis for allocation alleged by the petitioner.

The petitioner gives notice of the hearing as provided in Prob C §1220 (see §302.44), together with a copy of the petition and the order to show cause, if any. Prob C §11443.

b. [§302.175] Inventory and Appraisal

If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the estate and if an inventory and appraisal of the property has not been provided by the surviving spouse, the court must make an order to show cause why the information should not be provided. Prob C §11442.

c. [§302.176] Allocation

The personal representative and the surviving spouse may provide for allocation by agreement and, on a determination by the court that the agreement substantially protects the rights of interested persons, the allocation provided in the agreement must be ordered by the court. Prob C §11444(a).

In the absence of an agreement, each debt subject to allocation must first be characterized by the court as separate or community, in accordance with the laws of the state applicable to marital dissolution proceedings. Prob C §11444(b). The allocation of

liability is to be based on rules applicable to liability of marital property for debts during marriage. Cal L Rev Comment to Prob C §11144.

Following that characterization, the debt or debts are allocated as follows (Prob C §11444(b)):

- Separate debts of either spouse are allocated to that spouse's separate property assets, and community debts are allocated to the spouses' community property assets.
- If a separate property asset of either spouse is subject to a secured debt that is characterized as that spouse's separate debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt is treated as an unsecured separate debt of that spouse and allocated to the net value of that spouse's other separate property assets.
- If the net value of either spouse's separate property assets is less than that spouse's unsecured separate debt or debts, the unsatisfied portion of the debt or debts is allocated to the net value of that spouse's one-half share of the community property assets. If the net value of that spouse's one-half share of the community property assets is less than that spouse's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts must be allocated to the net value of the other spouse's one-half share of the community property assets.
- If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt must be treated as an unsecured community debt and allocated to the net value of the other community property assets.
- If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts are allocated equally between the separate property assets of the decedent and the surviving spouse. If the net value of either spouse's separate property assets is less than that spouse's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts are allocated to the net value of the other spouse's separate property assets.

The net value of either spouse's separate property asset refers to its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances on that asset that have been characterized as that spouse's separate debts. Prob C §11444(c)(1).

The net value of a community property asset refers to its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances on that asset that have been characterized as community debts. Prob C §11444(c)(2).

In the case of a nonrecourse debt, the amount of that debt is limited to the net equity in the collateral, based on the fair market value of the collateral as of the date of the decedent's death, that is available to satisfy that debt. "Nonrecourse debt" means a debt for which the debtor's obligation to repay is limited to the collateral securing the debt,

and for which a deficiency judgment against the debtor is not permitted by law. Prob C §11444(c)(3).

Notwithstanding the foregoing provisions, the court may order a different allocation of debts between the decedent's estate and the surviving spouse if the court finds a different allocation to be equitable under the circumstances. Prob C §11444(d).

d. [§302.177] Rights of Third Parties

The rights of third parties are not impaired or affected by the allocation provisions. If a personal representative or the surviving spouse incurs any damages or expense, including attorney's fees, on account of the nonpayment of a debt that was allocated to the other party under Prob C §11444(b), or as the result of a debt being misallocated due to fraud or intentional misrepresentation by the other party, the party incurring damages is entitled to recover from the other party for damages or expense deemed reasonable by the court that made the allocation. Prob C §11444(e).

e. [§302.178] Court Order

On making a determination on allocation, the court must make an order that (Prob C §11445):

- Directs the personal representative to make payment of the amounts allocated to the estate by payment to the surviving spouse or creditors.
- Directs the personal representative to charge amounts allocated to the surviving spouse against any property or interests of the surviving spouse that are in the possession or control of the personal representative. To the extent that property or interests of the surviving spouse in the possession or control of the personal representative are insufficient to satisfy the allocation, the court order must summarily direct the surviving spouse to pay the allocation to the personal representative.

Notwithstanding any other statute, funeral expenses and expenses of last illness are charged against the estate of the decedent and are not allocated to, or charged against the community share of, the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses. Prob C §11446.

7. Contingent, Disputed, and Not Due Debts

a. [§302.179] Court Order

When all other debts have been paid and the estate is otherwise in a condition to be closed, on petition by an interested person, the court may make or modify an order or a combination of orders that the court in its discretion determines is appropriate to provide adequately for a debt that is contingent, disputed, or not due, if the debt becomes absolute, established, or due. Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to the creditor whose debt is contingent, disputed, or not due, as well as to the persons provided in Prob C §11601. Prob C §11461.

A debt is “contingent” if it is established under Prob C §§9000 et seq in either a fixed or an uncertain amount and will become absolute on occurrence of a stated event other than the passage of time. The term includes a secured obligation for which there may be recourse against property in the estate, other than the property that is the security, if the security is insufficient. Prob C §11460(a).

A debt is “disputed” if it is a claim rejected in whole or in part under Prob C §§9000 et seq and is not barred under Prob C §9353 as to the part rejected. Prob C §11460(b).

A debt is “not due” if it is established under Prob C §§9000 et seq and will become due on the passage of time. The term includes a debt payable in installments. Prob C §11460(c).

If the court determines that all interested persons agree to the manner of providing for a debt that is contingent, disputed, or not due and that the agreement reasonably protects all interested persons and will not extend administration of the estate unreasonably, the court must approve the agreement. Prob C §11462.

The court may order an amount deposited in a financial institution, as provided in Prob C §9700, that would be payable if a debt that is contingent, disputed, or not due, were absolute, established, or due. The order must provide that the amount deposited is subject to withdrawal only upon authorization of the court, to be paid to the creditor when the debt becomes absolute, established, or due, or to be distributed in the manner provided in Prob C §11642 if the debt does not become absolute or established. Prob C §11463.

The court may order property in the estate distributed to a person entitled to it under the final order for distribution, if the person files with the court an assumption of liability for a contingent or disputed debt as provided below. The court may impose any other conditions that the court in its discretion determines are just, including that the distributee give a security interest in all or part of the property distributed or that the distributee give a bond in an amount determined by the court. Prob C §11464(a). As a condition for such an order, each distributee must file a signed and acknowledged agreement with the court, assuming personal liability for the contingent or disputed debt and consenting to jurisdiction within this state for the enforcement of the debt if it becomes absolute or established. The personal liability of each distributee shall not exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and encumbrances. If there is more than one distributee, the personal liability of the distributees is joint and several. Prob C §11464(b).

b. [§302.180] Enforcement

If the debt becomes absolute or established, it may be enforced against each distributee in the same manner as it could have been enforced against the decedent if the decedent had not died. In an action based on the debt, the distributee may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Prob C §11464(c).

The statute of limitations applicable to a contingent debt is tolled from the time the creditor’s claim is filed until 30 days after the order for distribution becomes final. The signing of an agreement to assume neither extends nor revives any limitation period. Prob C §11464(d).

c. [§302.181] Appointment of Trustee

The court may order that a trustee be appointed to receive payment for a debt that is contingent, disputed, or not due. The court in determining the amount paid to the trustee computes the present value of the debt, giving consideration to a reasonable return on the amount to be invested. The trustee must invest the payment in investments that would be proper for a personal representative or as authorized in the order. Prob C §11465(a).

The trustee must pay the debt as provided in the order. On completion of payment, any excess in possession of the trustee is distributed in the manner provided in Prob C §11642. Prob C §11465(b).

d. [§302.182] Bond

The court may order property in the estate distributed to a person entitled to it under the final order for distribution, if the person gives a bond conditioned on payment by the person of the amount of a contingent or disputed debt that becomes absolute or established. The amount of the bond is determined by the court, not to exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and encumbrances. In the case of a disputed debt or in the case of a contingent debt when litigation is required to establish the contingency, the cost of the bond is recoverable from the unsuccessful party as a cost of litigation. Prob C §11466.

The court may order that the administration of the estate continue until the contingency, dispute, or passage of time of a debt that is contingent, disputed, or not due is resolved. Prob C §11467.

M. Removal and Vacancy**1. [§302.183] Bases for Removal**

A personal representative may be removed from office for any of the following causes (Prob C §8502):

- The personal representative has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so. See *Estate of Feeney* (1983) 139 CA3d 812, 820–821, 189 CR 84 (mismanagement not rising to bad faith or cupidity is not sufficient for removal; court order requiring sale of property was sufficient remedy).
- The personal representative is incapable of properly executing the duties of the office or is otherwise not qualified for appointment as personal representative.
- The personal representative has wrongfully neglected the estate, or has long neglected to perform any act as personal representative.
- Removal is otherwise necessary for protection of the estate or interested persons.
- Any other cause provided by statute.

A conflict of interest may be ground for removal; it should be noted, however, that not every conflict necessarily requires removal for protection of the estate, depending on the circumstances of the particular case. Cal L Rev Comment to Prob C §8502.

Failure to perform statutory duties, waste or mismanagement of estate assets, assertion of adverse claim, conflict of interest, and incompetence requires removal of the executor. *Estate of Hammer* (1993) 19 CA4th 1621, 1635–1638, 24 CR2d 190.

An administrator may be removed from office on the petition of the surviving spouse or a relative of the decedent entitled to succeed to all or part of the estate, or the nominee of the surviving spouse or relative, if such person is higher in priority than the administrator. Prob C §8503(a). However, a court in its discretion may refuse to grant the petition (Prob C §8503(b)):

- If the petition is by a person or the nominee of a person who had actual notice of the proceeding in which the administrator was appointed and an opportunity to contest the appointment.
- If to do so would be contrary to the sound administration of the estate.

The petition should be accompanied by a petition for appointment of a successor who has higher priority than the existing personal representative. Cal L Rev Comment to Prob C §8503.

After appointment of an administrator on the ground of intestacy, the personal representative must be removed from office when there is a later admission of a will to probate. Prob C §8504(a).

After appointment of an executor or administrator with the will annexed, the personal representative must be removed from office when a later will is admitted to probate. Prob C §8504(b).

A personal representative may be removed from office if the personal representative is found in contempt for disobeying an order of the court. Prob C §8505(a). A personal representative also may be removed from office for contempt by a court order reciting the facts and without further showing or notice. Prob C §8505(b).

2. [§302.184] Petition for Removal

Any interested person may petition for removal of the personal representative from office. A petition for removal may be combined with a petition for appointment of a successor personal representative under Prob C §8520; see Prob C §48(a) (definition of interested person). The petition must state facts showing cause for removal. Prob C §8500(a).

On a petition for removal, or if the court otherwise has reason to believe from the court's own knowledge or from other credible information, whether on the settlement of an account or otherwise, that there are grounds for removal, the court issues a citation to the personal representative to appear and show cause why the personal representative should not be removed. The court may suspend the powers of the personal representative and may make such orders as are necessary to deal with the property pending the hearing. Prob C §8500(b). Notice must be given to any surety. Prob C §1213(a).

- **JUDICIAL TIP** Although not required by statute, the court should ensure that notice of the petition for removal is given to all persons interested in the estate.

Any interested person may appear at the hearing and file a written declaration showing that the personal representative should be removed or retained. The personal

representative may demur to or answer the declaration. The court may compel the attendance of the personal representative and may compel the personal representative to answer questions, on oath, concerning the administration of the estate. Failure to attend or answer is cause for removal of the personal representative from office. Prob C §8500(c).

The issues are heard and determined by the court. If the court is satisfied from the evidence that the citation has been duly served and cause for removal exists, the court must remove the personal representative from office. Prob C §8500(d). The court must give notice of the removal to the surety within 5 days of entry of the order. Prob C §1213(b).

On removal of a personal representative from office, the court revokes any letters issued to the personal representative, and the authority of the personal representative ceases. Prob C §8501.

3. Vacancy

a. [§302.185] When Vacancy Occurs

A vacancy occurs in the office of a personal representative who resigns, dies, or is removed from office (see §302.184), or whose authority is otherwise terminated. Prob C §8520.

b. [§302.186] Other Representatives

Unless the will provides otherwise or the court in its discretion orders otherwise, if a vacancy occurs in the office of fewer than all personal representatives, the remaining personal representatives must complete the administration of the estate. Prob C §8521(a).

The court, on the filing of a petition alleging that a vacancy has occurred in the office of fewer than all personal representatives, may order the clerk to issue appropriate amended letters to the remaining personal representatives. Prob C §8521(b).

c. [§302.187] Appointment of Successor

If a vacancy occurs in the office of a personal representative and there are no other personal representatives, the court appoints a successor personal representative. Prob C §8522(a).

Appointment of a successor personal representative is made on petition and service of notice on interested persons in the manner provided in Prob C §8110 (see §302.11), and is subject to the same priority as for an original appointment of a personal representative. The personal representative of a deceased personal representative is not, as such, entitled to appointment as successor personal representative. Prob C §8522(b).

The court may make orders that are necessary to deal with the estate of the decedent between the time a vacancy occurs in the office of personal representative and appointment of a successor. Those orders may include appointment of a special administrator. Prob C §8523.

d. [§302.188] Rights and Powers of Successor

A successor personal representative is entitled to demand, sue for, and recover and collect all the estate of the decedent remaining unadministered, and may prosecute any

suit to final judgment that is commenced by the former personal representative before the vacancy. Prob C §8524(a).

No notice, process, or claim given to or served on the former personal representative needs to be given to or served on the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Prob C §8524(b).

Except as provided in Prob C §8442(b) (authority of administrator with will annexed) or as otherwise ordered by the court, the successor personal representative has the powers and duties with respect to the continued administration that the former personal representative would have had. Prob C §8524(c).

e. [§302.189] Acts and Liabilities of Former Representative

The acts of the personal representative before a vacancy occurs are valid to the same extent as if no vacancy had later occurred. Prob C §8525(a).

The liability of a personal representative whose office is vacant, or of the surety on the bond, is not discharged, released, or affected by the vacancy or by appointment of a successor, but continues until settlement of the accounts of the personal representative and delivery of all the estate of the decedent to the successor personal representative or other person appointed by the court to receive it. The personal representative must render an account of the administration within the time that the court directs. Prob C §8525(b).

N. Distribution and Discharge

1. Petition for Preliminary or Final Distribution

a. [§302.190] Petition

The personal representative or an interested person may petition the court for an order for preliminary or final distribution of the decedent's estate to the persons entitled thereto. Prob C §11600; see Prob C §48 (definition of interested person).

Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §11601):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.
- The Controller, if property is to be distributed to the state because there is no known beneficiary or if property is to be distributed to a beneficiary whose whereabouts is unknown. A copy of the latest account filed with the court is served on the Controller with the notice.

A petition for distribution must list and describe in detail the property to be distributed, in the body of the petition or in an attachment that is incorporated in the

petition by reference. If an account is filed with the petition, the description must be included in a schedule in the account. Cal Rules of Ct 7.651(a).

The description must (Cal Rules of Ct 7.651(b)):

- Include the amount of cash on hand;
- Indicate whether promissory notes are secured or unsecured, and describe in detail the security interest of any secured notes;
- Include the complete legal description, street address (if any), and assessor's parcel number (if any) of real property; and
- Include the complete description of each individual security held in "street name" in security brokers' accounts.

If the character of property to be distributed may affect the distribution, a petition for distribution must allege (Cal Rules of Ct 7.652(a)):

- The character of the property to be distributed, whether separate, community, or quasi-community; and
- That the community or quasi-community property to be distributed is either the decedent's one-half interest only, or the entire interest of the decedent and the decedent's spouse.

If any property is to be distributed outright to the surviving spouse, a written election by the surviving spouse that complies with Prob C §13502 must have been filed, and the petition must show the filing date of the election. Cal Rules of Ct 7.652(b).

b. [§302.191] Contest

The personal representative or any interested person may oppose the petition. Prob C §11602; see Prob C §48 (definition of interested person).

c. [§302.192] Distribution

If the court determines that the requirements for distribution are satisfied, the court must order distribution of the decedent's estate, or such portion as the court directs, to the persons entitled thereto. Prob C §11603(a).

The order must (Prob C §11603(b)):

- Name the distributees and the share to which each is entitled.
- Provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under Prob C §9960, is distributed to the distributees subject to the terms of the limitation or condition.

If the whereabouts of a distributee named in the order is unknown, the order must provide for alternate distributees and the share to which each is entitled. The alternate distributees are the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the doctrine of cy pres. If the distributee named in the order does not claim the share to which the distributee is entitled within five years after the date

of the order, the distributee is deemed to have predeceased the decedent and the alternate distributees are entitled to the share as provided in the order. Prob C §11603(c). In a testate estate, the court determines the alternate distributees under the decedent's will and applicable statutes. If the primary distributee is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator, the anti-lapse statute applies (Prob C §21110), and the alternate distributees are the issue of the missing distributee. In an intestate estate, the court determines the alternate distributees under the laws of intestate succession. See Prob C §§6400–6414. Cal L Rev Comment to Prob C §11603.

d. [§302.193] Transferees

There are special provisions that are applicable when the distribution is made to a transferee or person other than a beneficiary. Prob C §11604. There are further special provisions when the transferee is made to a transferee for value who acquires any interest of a beneficiary in exchange for cash or other consideration. Prob C §11604.5.

e. [§302.194] Finality

When a court order becomes final, the order binds and is conclusive as to the rights of all interested persons. Prob C §11605.

2. Preliminary Distribution

a. [§302.195] Time for Petition

A petition for an order for preliminary distribution of all, or a portion of, the share of a decedent's estate to which a beneficiary is entitled may not be filed unless at least two months have elapsed after letters are first issued to a general personal representative. Prob C §11620. Notice of a hearing on the petition must be given to the same people as for a general notice. Prob C §§11601, 1220; see discussion at §302.44.

b. [§302.196] Distribution

The court must order a preliminary distribution if at the hearing it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person. Prob C §11621(a). It is the established policy of this state to encourage the distribution of property to legatees as soon as can be done without jeopardizing the rights of others interested in the estate. *Estate of Beach* (1975) 15 C3d 623, 641, 125 CR 570. The order for distribution is stayed until any bond required by the court is filed. Prob C §11621(b).

If the court orders distribution before four months have elapsed after letters are first issued to a general personal representative, the court must require a bond. The bond is in the amount of the distribution. Prob C §11622(a).

If the court orders distribution after four months have elapsed after letters are first issued to a general personal representative, the court may require a bond. The bond must be in the amount that the court orders. Prob C §11622(b).

A court order for a preliminary distribution, once final and in the absence of fraud, is conclusive. Prob C §7250; *Estate of Strader* (2003) 107 CA4th 996, 1004 n6, 132 CR2d 649.

c. [§302.197] Bond

Any bond required by the court is given by the distributee and filed with the court. The bond must be conditioned on payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed. Prob C §11622(c).

d. [§302.198] Authority Under IAEA

Notwithstanding the above, if authority is granted to administer the estate without court supervision under the IAEA (see §302.28) (Prob C §11623(a)):

- The personal representative may petition the court for an order for preliminary distribution on notice as provided in Prob C §1220 (see §302.44). However, the court may not dispense with notice unless the time for filing creditor claims has expired.
- The aggregate of all property distributed must not exceed 50 percent of the net value of the estate. "Net value of the estate" means the excess of the value of the property in the estate, as determined by all inventories and appraisals on file with the court, over the total amount of all creditor claims and of all liens and encumbrances recorded or known to the personal representative not included in a creditor claim, excluding any estate tax lien occasioned by the decedent's death.

Nothing in this provision limits the authority of the personal representative to make preliminary distribution under other provisions, whether or not authority is granted to administer the estate under the IAEA. Prob C §11623(b).

e. [§302.199] Costs

Costs of a proceeding for preliminary distribution are paid by the distributee or the estate in proportions determined by the court. Prob C §11624. One factor in the exercise of the court's discretion could be whether the personal representative was negligent in failing to make prompt distribution, necessitating a petition. Cal L Rev Comment to Prob C §11624.

3. [§302.200] Continuation of Administration

If debts remain unpaid or not adequately provided for or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for a reasonable time, subject to Prob C § 12200 (time for closing estate). Prob C §11640(c).

For purposes of this chapter, continuation of the administration of the estate in order to pay a family allowance is not in the best interests of the estate or interested persons unless the court determines both of the following (Prob C §12203(a)):

- The family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage.
- The needs of the recipient for continued family allowance outweigh the needs of the decedent's beneficiaries whose interests would be adversely affected by continuing the administration of the estate for this purpose.

Nothing in this provision shall be construed to authorize continuation of a family allowance beyond the time prescribed in Prob C §6543 (see §302.55). Prob C §12203(b).

Nothing in this provision limits the power of the court to order a preliminary distribution of the estate. Prob C §12203(c).

A limitation in a will of the time for administration of an estate is directory only and does not limit the power of the personal representative or the court to continue administration of the estate beyond the time limitation in the will if the continuation is necessary. Prob C §12206.

4. [§302.201] Petition To Determine Distribution

At any time after letters are first issued to a general personal representative and before an order for final distribution is made, the personal representative, or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate, may file a petition for a court determination of the persons entitled to distribution of the decedent's estate. The petition shall include a statement of the basis for the petitioner's claim. Prob C §11700.

Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to all of the following persons (Prob C §11701):

- Each person listed in Prob C §1220.
- Each known heir whose interest in the estate would be affected by the petition.
- Each known devisee whose interest in the estate would be affected by the petition.
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

Any interested person may appear and, at or before the time of the hearing, file a written statement of the person's interest in the estate. The written statement may be in support of, or in opposition to, the petition. No other pleadings are necessary and the written statement of each claimant is deemed denied by each of the other claimants to the extent the written statements conflict. Prob C §11702(a); see Prob C §48 (definition of interested person).

If a person fails timely to file a written statement (Prob C §11702(b)):

- The case is at issue notwithstanding the failure and the case may proceed on the petition and written statements filed by the time of the hearing, and no further pleadings by other persons are necessary.
- The person may not participate further in the proceeding for determination of persons entitled to distribution, but the person's interest in the estate is not otherwise affected.
- The person is bound by the decision in the proceeding.

The Attorney General is deemed to be a person entitled to distribution of the estate if the estate involves or may involve any of the following (Prob C §11703):

- A charitable trust, other than a charitable trust with a designated trustee that may lawfully accept the trust.

- A devise for a charitable purpose without an identified beneficiary.
- An escheat to the State of California.

The court shall consider any statement made in a petition filed under Prob C §11700 and any statement of interest filed under Prob C §11702 as evidence in the proceeding. The court shall not hear or consider a petition filed after the time prescribed in Prob C §11700. Prob C §11704(a).

The personal representative may file papers and otherwise participate in the proceeding as a party to assist the court. Prob C §11704(b).

The court shall make an order that determines the persons entitled to distribution of the decedent's estate and specifies their shares. Prob C §11705(a).

When the court order becomes final, it binds and is conclusive as to the rights of all interested persons. Prob C §11705(b).

5. Petition for Final Distribution

a. [§302.202] Petition and Order

When all debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, the personal representative files a petition for, and the court makes, an order for final distribution of the estate. Prob C §11640(a). Unless there has been a waiver of accounts, the estate is not in a condition to be closed until final settlement of the accounts of the personal representative. Cal L Rev Comment to Prob C §11640.

The court must hear, determine, and resolve in the order all questions arising under Prob C §21135 (ademption by satisfaction) or Prob C §6409 (advancements). Prob C §11640(b).

For each claim presented, the personal representative must state in the final report or petition for final distribution (Cal Rules of Ct 7.403):

- The claimant's name;
- The date of filing of the claim;
- The nature of the claim;
- The amount claimed;
- The disposition of the claim; and
- If the claim was rejected, the date of service of the rejection and whether or not a lawsuit was filed.

b. [§302.203] Time for Final Distribution

The personal representative must either petition for an order for final distribution of the estate or make a report of status of administration not later than the following times (Prob C §12200):

- In an estate for which a federal estate tax return is not required, within one year after the date of issuance of letters. The time period runs from the initial

appointment of a personal representative, even if a subsequent representative is appointed. *Estate of Justesen* (1999) 77 CA4th 352, 360, 91 CR2d 574.

- In an estate for which a federal estate tax return is required, within 18 months after the date of issuance of letters.

c. [§302.204] Report on Status

If a report of status of administration is made under Prob C §12200 (Prob C §12201):

- The report must show the condition of the estate, the reasons why the estate cannot be distributed and closed, and an estimate of the time needed to close administration of the estate.
- The report must be filed with the court. Notice of hearing of the report is given as provided in Prob C §1220 (see §302.44) to persons then interested in the estate, and must include a statement in not less than 10-point boldface type or a reasonable equivalent thereof if printed, or in all capital letters if not printed, in substantially the following words: “YOU HAVE THE RIGHT TO PETITION FOR AN ACCOUNT UNDER SECTION 10950 OF THE CALIFORNIA PROBATE CODE.”

On the hearing of the report, the court may order either of the following (Prob C §12201(c)):

- That the administration of the estate continue for the time and on the terms and conditions that appear reasonable, including an account under Prob C §10950, if the court determines that continuation of administration is in the best interests of the estate or of interested persons. The court may not order an account under Prob C §10950 if the waiver or satisfaction provisions of Prob C §10954 (when account is not required) are satisfied. Cal L Rev Comment to Prob C §12201.
- That the personal representative petition for final distribution.

d. [§302.205] Citation of Personal Representative

The court may, on petition of any interested person or on its own motion, for good cause shown on the record, cite the personal representative to appear before the court and show the condition of the estate and the reasons why the estate cannot be distributed and closed. Prob C §12202(a).

On the hearing of the citation, the court may either order the administration of the estate to continue or order the personal representative to petition for final distribution, as Prob C §12202(b).

Failure of the personal representative to comply with an order is grounds for removal from office. Prob C §12204.

e. [§302.206] Order for Final Distribution

An order for distribution must be entered at length in a judgment book or other permanent record of the court. Prob C §1048(b). The decree of distribution, when it

becomes final, is conclusive as to the rights of heirs, devisees, and legatees, even if erroneous. *Billups v Tiernan* (1970) 11 CA3d 372, 379, 90 CR 246.

When the order becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. Prob C §7250(a). The release provision, however, does not apply if the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact. Misrepresentation includes, but is not limited to, the omission of a material fact. Prob C §7250(c).

When an order settling a final account and for final distribution is entered, the personal representative may immediately distribute the property in the estate to the persons entitled to distribution, without further notice or proceedings. Prob C §11641.

f. [§302.207] Testamentary Trust

Upon distribution, the court must (Cal Rules of Ct 7.650(a)):

- Determine whether a valid testamentary trust has been created by the will;
- Determine the terms of the trust; and
- Order distribution of the trust property to the trustee.

The order for distribution must incorporate the terms of the trust so as to give effect to the conditions existing at the time that distribution is ordered. The pertinent provisions must be stated in the present tense and in the third person instead of quoting the will verbatim. Cal Rules of Ct 7.650(b).

g. [§302.208] After Acquired Property

Any property acquired or discovered after the court order for final distribution is made must be distributed in the following manner (Prob C §11642):

- If the order disposes of the property, distribution is made in the manner provided in the order. The court may, in an appropriate case, require a supplemental account and make further instructions relating to the property.
- If the order does not dispose of the property, distribution is made either (1) in the manner ordered by the court on a petition for instructions or (2) under Prob C §12252 (administration after discharge) if the personal representative has been discharged.

6. [§302.209] Distribution

The personal representative is responsible for distribution of the property in the estate in compliance with the terms of the court order for distribution. Prob C §11750(a).

A distributee may demand, sue for, and recover from the personal representative or any person in possession, property to which the distributee is entitled. Prob C §11750(b).

A distribution of property made in compliance with the terms of the court order for distribution is valid as to a person acting in good faith and for a valuable consideration. Prob C §11750(c).

The personal representative must obtain the receipt of the distributee for property in the estate distributed by the personal representative. In the case of real property, the personal representative must record the court order for distribution or the personal representative's deed or both in the county in which the real property is located. Recordation of the order or deed is deemed to be a receipt of the distributee for the property. Prob C §11751.

If personal property in the possession of a distributee is subject to possession by the distributee for life only, the personal representative must demand an inventory of the property from the distributee. On receipt, the personal representative files the inventory with the court and delivers a copy to any distributee of the remainder. Prob C §11752.

Distribution in compliance with the court order entitles the personal representative to a full discharge with respect to property included in the order. Prob C §11753(a).

The personal representative must, before or at the time of the petition for discharge, file receipts for all property in the estate. In the case of real property, the personal representative must file a statement that identifies the date and place of the recording and other appropriate recording information for the court order for distribution or the personal representative's deed. Prob C §11753(b). The court may excuse the filing of a receipt on a showing that the personal representative is unable, after reasonable effort, to obtain a receipt and that the property has been delivered to or is in the possession of the distributee. Prob C §11753(c).

Expenses of administration of the estate include reasonable storage, delivery, and shipping costs for distribution of tangible personal property to a distributee. Prob C §11754.

7. [§302.210] Discharge

When the personal representative has complied with the terms of the order for final distribution and has filed the appropriate receipts or the court has excused the filing of a receipt as provided in Prob C §11753, the court must, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter. Prob C §12250(a). The estate is fully administered when all sums of money due from the personal representative have been paid, all property of the estate has been distributed to the persons entitled under court order, and all the acts lawfully required of the personal representative have been performed. Cal L Rev Comment to Prob C §12250.

The required form of Ex Parte Petition for Final Discharge and Order is Judicial Council Form DE-295.

Nothing precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied. Prob C §12250(b).

At any time after appointment of a personal representative and whether or not letters have been issued, if it appears that there is no property of any kind belonging to the estate and subject to administration, the personal representative may petition for the termination of further proceedings and for discharge of the personal representative. The petition must state the facts on which it is based. Prob C §12251(a).

Notice of the hearing on the petition is given as provided in Prob C §1220 (see §302.44) to all interested persons. Prob C §12251(b).

If it appears to the satisfaction of the court on the hearing that the facts stated in the petition are true, the court must make an order terminating the proceeding and discharging the personal representative. Prob C §12251(c).

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